Supreme Court, U. S.
FILED
JUL 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians *ad litem*, on her own behalf and on behalf of all others similarly situated,

Petitioners,

—v.—

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SHARON K. WALLIS
ELEANOR FLICK
640-42 Rodman Street
Philadelphia, Pa. 19147

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN WILLERT PERATIS
SUSAN C. ROSS
JILL LAURIE GOODMAN
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioners

INDEX

	PAGE
Opinions Below.	2
Jurisdiction.	2
Question Presented.	2
Constitutional Provision and Statute Involved	3
Statement of the Case	5
Reasons for Granting the Writ . .	10
CONCLUSION.	24

TABLE OF AUTHORITIES

Cases:

Brown v. Board of Education, 347 U.S. 483 (1954). . . . 13,14,18

Collett, Ex Parte, 337 U.S. 55 (1949) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 16

Hoyt v. Florida, 368 U.S. 57 (1961) 16

Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) 20

PAGE

Mathews v. Lucas, 44 U.S.L.W. 5139 (June 29, 1976). 14

Plessy v. Ferguson, 163 U.S. 537 (1896). 13

Reed v. Reed, 404 U.S. 71 (1971). 13,14,16,20

Stanton v. Stanton, 421 U.S. 7 (1975). 13,16,20

Sweatt v. Painter, 339 U.S. 629 (1950). 13,14,17

Taylor v. Louisiana, 419 U.S. 522 (1975). 16

United States v. Oregon, 366 U.S. 643 (1961) 22

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 14,16

Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971) 14,16,17

Constitutional Provision:

United States Constitution Fourteenth Amendment 3

PAGE

Federal Statutes:

28 U.S.C. §1254(1). 2

28 U.S.C. §1343 5

42 U.S.C. §1983 5

Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701 (a)(1), 1702(a)(1), 1703(c), 1705, 1715 (Supp. 1976). . . passim

Fed. R. Civ. P. 23(b)(2). 5

State Statute:

Code of South Carolina Sections 401, 408, Title 22. . . 15

Other Authorities Cited:

Jencks & Reisman, The Academic Revolution (1968). 17,18

Note, 89 Harv. L. Rev. 95 (1975). . 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians ad litem, on her own behalf and on behalf of all others similarly situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Susan Vorchheimer, on her own behalf and on behalf of the class she represents, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered March 16, 1976, rehearing en banc denied April 12, 1976.

Opinions Below

The March 16, 1976 opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the April 12, 1976 order denying rehearing en banc is not yet reported; both are set out in the Appendix, infra, at 1a-36a. The August 7, 1975 Findings of Fact, Conclusions of Law, Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania are reported at 400 F. Supp. 326; they are set out in the Appendix, infra, at 38a.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered March 16, 1976; a timely petition for rehearing en banc was denied April 12, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the Constitution and laws of the United States permit a municipal public school system to maintain totally sex-segregated senior high schools for scholastically superior students, where the effect is to reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities.

Constitutional Provision and Statute Involved

The fourteenth amendment to the United States Constitution provides in pertinent part:

> **No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758 (Supp. 1976), provides in pertinent part:

> 1701(a) The Congress declares it to be the policy of the United States that --
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . .
>
> 1702(a) The Congress finds that --
>
> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the fourteenth amendment . . . .

1703 No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by --

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . . sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .

1705 [T]he assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational

opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of . . . sex . . . .

STATEMENT OF THE CASE

Petitioner, secondary school student Susan Vorchheimer, commenced this class action on March 29, 1974, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. She sought to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to Central High School, Philadelphia's most renowned, scholastically-oriented secondary school.[1]

At both the junior and senior high school levels, Philadelphia maintains "academic" schools for scholastically superior students. Susan Vorchheimer attended Masterson School, a coeducational academic junior high school. Upon graduation in June 1974, she was designated most outstanding student and received several other awards, including the awards in science and geometry. Despite her conceded academic

---

1 **Pursuant to Fed. R. Civ. P. 23(b)(2), Susan Vorchheimer was certified as the representative of all females who otherwise meet Central High School's admission standards but have been, are, or will be denied admission to Central because of their sex. (Conclusion 3.)**

qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex. (Fact Findings 12, 14, 15; Conclusion 4.)

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High, which as the name implies, is confined to females. These two schools differ from other Philadelphia secondary schools in fundamental respects. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from the entire city; all other schools operate on a neighborhood basis. Most Philadelphia high schools are substantially overcrowded; enrollment at Central and Girls is under capacity. (Fact Findings 6, 7, 29, 51.)

Central and Girls are single-sex schools; the vast majority of public high school students in Philadelphia attend coeducational schools. (Fact Finding 8.) A senior high school student seeking the highest quality academic preparation the District offers does not have the choice of attending a coeducational school. (Conclusion 5.)

Central was founded in 1836. The first public high school in Philadelphia and the second in the nation, it has consistently maintained a national reputation for academic excellence. (Fact Findings 17, 20.) Girls

High evolved from a school established in 1848 for the primary purpose of training teachers for Philadelphia's public schools. (Fact Finding 18.)

It is undisputed that Central's scientific facilities are superior to those of Girls High. (Fact Finding 26.)

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma mater. Central is the only high school in Philadelphia with a substantial private endowment. (Fact Findings 20, 22.)

These plain facts, found by the district court and not contested on appeal by Philadelphia School District, explain the unique position of Central. No similar findings were made, nor could they be made, as to Girls: it has not attracted the same national attention, alumni contributions or endowment; its science facilities are inferior to those of Central.

Based on these findings, the district court held that Central's exclusionary policy adversely affects Susan Vorchheimer and the class she represents by denying them the opportunity to attend a coeducational, academically superior public high school, a school with an unequaled history and national reputation. 400 F. Supp. at

342. The court noted that fostering career successful women is not one of Philadelphia's objectives in excluding females from Central. (Conclusion 5.) Males, not females, the court determined, are the intended beneficiaries of Philadelphia's exclusionary academic high school arrangement. 400 F. Supp. at 342. Concluding that the arrangement denied females the equal protection of the laws, the court enjoined Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any other member of the class she represents to Central High School solely on the basis of her sex."

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"), the Court of Appeals for the Third Circuit reversed 2-1.[2] The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." Further, it called attention to the fact that "in the scientific field . . . Central's [academic facilities] are superior." Inexplicably, in light of the record and fact findings below, the majority held Susan

---

2 Judge Gibbons dissented; Judge Weis was joined in the majority by Chief Judge Markey of the Court of Customs and Patent Appeals.

Vorchheimer and those she represents are not denied the equal protection of the laws by their exclusion from Central. In addition, ruling on a statutory issue not aired in the district court,[3] the majority held Congress could not have meant what it said when it declared in 1974:[4]

> **[T]he maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. §1702(a)(1).**

---

3 This issue, the application of the Equal Educational Opportunities Act of 1974, was raised sua sponte by the court of appeals.

4 See also 20 U.S.C. §§1703(c), 1705, 1715.

Reasons for Granting the Writ

The central question raised in this case is whether a municipal public school system, consistent with the equal protection principle, may enforce separation of the sexes in its academic high schools to the detriment of female students. The system in question offers no option, no freedom of choice to the student qualified for and desiring admission to an academic high school. No coeducational facility is provided for the scholastically superior student; she must accept assignment to an all-female facility, a facility less celebrated and richly endowed than the all-male facility, or forgo the opportunity to attend a secondary school with high admission standards offering only college preparatory courses. It is petitioner's position that the officially mandated segregation imposed on intellectually gifted females by the arrangement in question reinforces a tradition that channels and curtails young women's aspirations and opportunities, and retards progress toward a society in which women and men associate with each other as full and equal partners.

I.

The Ruling of the Majority Below, Sanctioning Exclusion of Girls from a Municipal Public School System's Most Renowned and Richly Endowed Secondary School, with Superior Facilities in the Scientific Field, is Inconsistent with Decisions of this Court Establishing as Constitutional Principle the Right of Females to the Genuinely Equal Protection of the Laws.

A.

Plaintiff Susan Vorchheimer, in this class action on behalf of scholastically superior female students, has maintained throughout the litigation that Philadelphia's two academic secondary schools, Central and Girls, are not equal. Some, but far from all of the differences reflected in the trial record, are reported in the district court's Fact Findings. (See Findings 17, 20, 22, 26.) The court of appeals majority, although it paid scant attention to the trial record[5] and did not advert to quality distinctions noted by the district court, did acknowledge: facilities in the scientific field are superior at Central. 532

---

5 **A record that flatly contradicts the court of appeals majority's gratuitous and wholly unfounded assertion, 532 F.2d at 886, that Susan Vorchheimer does not claim "deprivation of an education equal to that which the school board makes available to boys."**

F.2d at 882. Thus any pretense of fully equal, albeit separate, educational facilities for girls is belied by the record, the district court's unchallenged findings, and even the grudging recognition by the court of appeals majority that Susan Vorchheimer, most outstanding student in her academic junior high school and winner of that school's science and geometry awards, was barred, solely on account of her sex, from the Central school, an institution with scientific facilities unmatched at the Girls school open to her.

While Girls High is a distinguished school in its own right, its facilities, history and associated qualities do not fully equal those of Central. As the city's first and the nation's second public high school, Central is uniquely rich in tradition and prestige; its alumni, loyal and generous as college alumni, have established a private endowment for Central; Central's graduates, an influential group within Philadelphia, have become leaders in business, the professions, politics, and the academic world; Central's reputation has attracted distinguished speakers to the school, including Presidents and other high-ranking federal officials. Girls High is not privately endowed, nor does it have a speaker's program attracting the nation's foremost leaders; the number of its influential graduates does not approach that of Central. See 400 F. Supp. at 328-329.

In short, Central possesses to a "greater degree [than Girls] those qualities

which are incapable of objective measurement but which make for greatness in a . . . school." See Sweatt v. Painter, 339 U.S. 629, 634 (1950). In this case, as in Sweatt, a school's historic standing in the community, and its well-positioned, influential, and highly supportive alumni, should be of overriding significance in determining whether reservation of the school to a dominant class denies equal protection to members of the excluded class.

B.

The quick write-off of plaintiff's constitutional claim by the majority below rests on failure to comprehend the vibrant principle reflected in this Court's precedent from Reed v. Reed, 404 U.S. 71 (1971), through Stanton v. Stanton, 421 U.S. 7 (1975). Sweatt v. Painter, 339 U.S. 629 (1950), as well as Brown v. Board of Education, 347 U.S. 483 (1954), were deemed "inapplicable" by the court of appeals majority because those decisions involved race rather than sex classifications. 352 F.2d at 886.[6] More thoughtful assessment

---

[6] It is difficult to perceive on what basis the majority below deemed Sweatt "inapplicable," for that case was decided during the era in which Plessy v. Ferguson, 163 U.S. 537 (1896), held sway.

of this Court's post-Reed gender discrimination/equal protection decisions, see, e.g., Note, 89 Harv. L. Rev. 95 (1975), should have revealed that Sweatt and Brown are very much in point. As the Court recently observed, historic legal and political discrimination based on sex, like discrimination based on race, has been severe and pervasive. And more than other identifying criteria (national origin, alienage) elevated to the "suspect" categories, race and sex carry "an obvious badge." Mathews v. Lucas, 44 U.S.L.W. 5139, 5142 (June 29, 1976). For these reasons, the Court closely reviews official conduct alleged to deny genuinely equal opportunity to women. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

C.

Principal reliance was placed by the majority below on Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971),[7] an authority not genuinely in point. For that case entailed no optionless sex segregation, nor any educational disadvantage imposed on members of one sex. Williams v. McNair concerned the State of South Carolina university

---

7 The majority saw "no basis for differentiation between Williams and the case at bar," and viewed that decision as "strong, if not controlling authority." 532 F.2d at 887.

system, a system comprising a wide range of educational institutions, all but two of them coeducational. The first exception, the Citadel, was an all-male college. Designated as a military school, the Citadel granted degrees in engineering and also offered a full complement of undergraduate liberal arts courses. The second, Winthrop, was "designed as a school for young ladies . . . [giving] special attention to many courses thought to be specially helpful to female students." 316 F. Supp. at 136.[8]

---

8 A clarifying footnote to the district court's opinion sets out relevant provisions of the South Carolina Code as follows (316 F. Supp. at 136 n.3):

> See Section 401, Title 22, Code of South Carolina (1962):
>
> "There shall be established an institution for the practical training and higher education of white girls which shall be known as Winthrop College * * *."

In Section 408, Title 22, the purpose of Winthrop College was stated to be:

> "The establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State, the main object of which shall be (1) to give to young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness . . . .

Plaintiffs in Williams v. McNair were males who sought admission to Winthrop. They were "free to attend either an all-male or . . . a number of co-educational institutions at various locations over the State." 316 F. Supp. at 137-38. They claimed no special feature connected with Winthrop that would "make it more advantageous educationally to them than any number of other State-supported institutions." 316 F. Supp. at 138. In short, the sole factor on which their preference for Winthrop rested was its proximity to their homes. Ruling that the Constitution does not safeguard to students a right to attend the State college in their home town, the district court entered judgment for defendants and this Court summarily affirmed.[9]

---

9 The district court opinion in Williams v. McNair does essay appraisal of the then "state of the art" on constitutional challenges to official line drawing by gender. The opinion sets out as the most recent High Court expression Hoyt v. Florida, 368 U.S. 57 (1961), a decision now overturned, see Taylor v. Louisiana, 419 U.S. 522 (1975); it states that gender-based discrimination by law or regulation is constitutional unless "wanting in any rational justification." 316 F. Supp. at 136. This Court's summary affirmance in Williams surely does not imply agreement with that proposition. Rather, full opinions of "this Court treating the question on the merits," cf. Edelman v. Jordan, 415 U.S. 651, 671 (1974), indicate the heightened review standard evolving in gender discrimination cases since Reed v. Reed, supra, the path-marking decision rendered some months after the Williams summary affirmance. See, e.g., Weinberger v. Wiesenfeld, supra, Stanton v. Stanton, supra.

In stark contrast, the instant case presents a grave issue not even remotely involved in Williams v. McNair: May a public school system deny females access to an educational institution that does offer special features, an institution that is more advantageous educationally to them than any other institution, an institution possessing qualities, including the "position and influence of the alumni," that give it unparalleled standing in the community. See Sweatt v. Painter, supra, 339 U.S. at 634.

D.

Even if Girls facilities approached the theoretical "separate but equal" model, the claim of Susan Vorchheimer and the class she represents would be well-founded. The very names assigned to the two schools tell the story; they are symbolic of a larger inequality identical facilities would not cure. Teen-age Susan Vorchheimer put it this way: "I liked the atmosphere [at Central] and also what I had heard . . . about its academic excellence." "I didn't think I would be able to go [to Girls High] for three years and not be harmed in any way by it." More senior scholars, addressing the issue of exclusion of women from men's colleges, elaborated:

> The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But

> it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority -- assumptions for which women must eventually pay. (C. Jencks & D. Reisman, The Academic Revolution 297-98 (1968).)[10]

In sum, Philadelphia School District's refusal to admit Susan Vorchheimer and her class to Central, and its insistence that these academically-gifted young women be content with their place at Girls, viewed in historical and social context, carry a clear message. The District policy places an official imprimatur on categorization of females as members of "the second sex."

---

10 Cf. this Court's recognition in Brown v. Board of Education, supra, 347 U.S. at 494:

> To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.

Jencks & Reisman, supra at 298, further observed that men too pay a price for the sexual arrogance preserved by all-male schools. They also stated that the arguments against women's colleges are not as persuasive as the arguments against men's colleges: "This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense."

E.

No evidence in the record supports the theory that achievement of Philadelphia's academically superior students is greater in sex segregated schools than in coeducational schools.[11] Nor does the operation

---

11 Two expert witnesses were presented by the School District: Dr. Jones who reported on an attitude (not achievement) survey he administered in New Zealand general schools; Dr. Tidball, who reported the results of her random selections from Who's Who in American Women for the period from the 1910's to the 1950's. Dr. Jones acknowledged, and the district court found, that the New Zealand survey was uninstructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically superior students. (Fact Findings 39-50; Conclusion 5.) Dr. Tidball's sampling is hardly a measure of what females could achieve at a school with Central's history, national recognition, accomplished and loyal graduates. A 1910's to 1950's Who's Who search would turn up not a single woman achiever from the nation's most prestigious, richly endowed colleges. For the gates of, e.g., Princeton, Yale, Harvard, Dartmouth, Brown, Amherst, like Central's door today, were then shut to women.

of academic high schools on a totally sex segregated basis promote freedom of choice. For scholastically superior students seeking the best academic education the Philadelphia system offers, there is no coeducation option. Far from establishing a "fair and substantial relationship" to legitimate objectives the school board seeks to advance, see Reed v. Reed, supra, 404 U.S. at 76, Philadelphia School District's policy reinforces a tradition that retards progress toward a society in which women and men associate with each other as full and equal partners.[12]

---

12 As stipulated in the district court, "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." 532 F.2d at 882. But nothing in the stipulation identifies the premises underlying that approach. The majority below speculates the props may be "human experience," cf. Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972) (rejecting "the demonstrated facts of life" as support for gender lines in the law), and a "theory of equal benefit." 532 F.2d at 887. At least as likely, this approach, with its long, world-wide history, is rooted in familiar generalizations concerning the "natural" behavior, proclivities and preferences of the two sexes, in overbroad assumptions about "the way girls and women (or boys and men) are," generalizations and assumptions this Court has firmly rejected as a ground for legal regulation of the sexes. See Stanton v. Stanton, supra. Neither the record nor any source cited by the majority below supplies any factual basis for believing the goal of equal educational opportunity is fostered by keeping Susan Vorchheimer and her class out of a school that has no functional equivalent in terms of its tradition and close association with community leaders in all fields of endeavor.

II.

Judicial Enforcement of the 1974 Equal Educational Opportunities Act's Sex Segregation Ban, an Important Issue of Federal Law that Sharply Divided the Court Below, Merits Dispositive Adjudication by this Court.

In the Equal Educational Opportunities Act of 1974, Congress declared "all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . ." 20 U.S.C. §1701(a)(1). Congress found "the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws . . . ." 20 U.S.C. §1702(a)(1). And Congress outlawed school assignments that result "in a greater degree of segregation of students on the basis of . . . sex . . . ." 20 U.S.C. §1703(c). Further, Congress stipulated that assignments based on grade level or type of education, to conform to equal educational opportunity and equal protection laws, must not have as a purpose "segregating students on the basis of . . . sex . . . ." 20 U.S.C. §1705. In these clear words, Congress proscribed the very conduct at issue here.

Mandatory separation of students by sex in the only schools specially maintained for academically-gifted students surely does increase the degree of segregation on the basis of sex within the school system, precisely the practice prohibited by 20 U.S.C. §1703(c). And by reserving the Central facilities for boys, the Philadelphia School District surely does deny girls equal educational opportunity without regard to sex.

Discomforted by the plain meaning of the words Congress used, the majority below indulged in a tortured analysis of legislative non-history. It gleaned from the refusal of one Congress to deal with sex segregated schools, the intent of a later Congress to say one thing and mean another. Commenting on this mode of statutory construction,[13] Judge Gibbons, in his dissenting opinion, said:

> **The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control . . . interpretation of the words of**

---

13 See United States v. Oregon, 366 U.S. 643, 648 (1961); Ex parte Collett, 337 U.S. 55, 61 (1949) (when the statutory language is clear, resort to legislative history to spy out a different meaning is inappropriate).

> **the ninety-third Congress . . . in 1974. Congressional silence, especially that of a different Congress, . . . can never be used to supercede the clear language of a statute. (532 F.2d at 891.)**

In summary, the Equal Educational Opportunities Act provides secure support, independent of the constitutional ground, for the judgment of the district court. The court of appeals majority reached a contrary conclusion only by ignoring the plain meaning of the words used in the Act and divining legislative intent in a manner that should attract this Court's firm disapprobation.

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

Sharon K. Wallis
Eleanor Flick
640-42 Rodman Street
Philadelphia, Pa. 19147

Ruth Bader Ginsburg
Melvin L. Wulf
Kathleen Willert Peratis
Susan C. Ross
Jill Laurie Goodman
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioners

July, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT AND CAROL VORCHHEIMER, Guardians ad litem,
Plaintiffs-Appellees

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-791)

Argued October 31, 1975

Before: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Court of Customs and Patent Appeals* and WEIS, *Circuit Judge.*

Alan H. Gilbert, Esq.
Parkway & 21st Street
Philadelphia, Pennsylvania
Attorney for Appellants

Sharon K. Wallis, Esq.
Eleanor Flick, Esq.
640-42 Rodman Street
Philadelphia, Pennsylvania
Attorneys for Appellees

* Sitting by designation.

OPINION OF THE COURT

(Filed March 16, 1976)

WEIS, *Circuit Judge.*

Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal? This appeal presents those questions and, after careful consideration, we answer negatively. Accordingly, we vacate the district court's judgment which held that the school board policy was impermissible.[1]

Plaintiff is a teen-age girl who graduated with honors from a junior high school in Philadelphia. She then applied to Central High School, a public school in the city, but was refused admission because that institution is restricted to male students. After that setback, she filed this class action in the United States District Court seeking relief under 42 U.S.C. § 1983 from alleged unconstitutional discrimination. After a trial, the district court granted an injunction, ordering that she and other qualified female students be admitted to Central.

The Philadelphia School District offers four types of senior high schools: academic, comprehensive, technical and magnet. Although this suit is aimed at only an academic school, it is necessary to review the roles of other schools as well.

Comprehensive schools provide a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are in-

1. The district court's opinion is published at 400 F. Supp. 326 (E.D. Pa. 1975).

tellectually able to progress at a faster than average rate. The criterion for enrollment in the comprehensive schools is residency within a designated area. Although most of these schools are co-ed, two admit only males and one is restricted to female students. At the time the injunction was granted, plaintiff was enrolled at George Washington High School, a coeducational comprehensive school.

Academic high schools have high admission standards and offer only college preparatory courses. There are but two such schools in Philadelphia, and they accept students from the entire city rather than operating on a neighborhood basis. Central is restricted to males, and Girls High School, as the name implies, admits only females.

Central High School was founded in 1836 and has maintained a reputation for academic excellence. For some years before 1939, it was designated a comprehensive rather than an academic high school as it is presently. Its graduates both before and after 1939 have made notable contributions to the professions, business, government and academe.

Girls High has also achieved high academic standing. It was founded in 1848 and became an academic school in 1893. Its alumnae have compiled enviable records and have distinguished themselves in their chosen diverse fields. It now has a faculty of more than 100 and a student body of approximately 2,000, about the same as those of Central.

Enrollment at either school is voluntary and not by assignment. Only 7% of students in the city qualify under the stringent standards at these two schools, and it is conceded that plaintiff met the scholastic requirements of both. The Philadelphia school system does not have a co-ed academic school with similar scholastic requirements for admission.

The courses offered by the two schools are similar and of equal quality. The academic facilities are comparable, with the exception of those in the scientific field where Central's are superior. The district court concluded "that

[generally] the education available to the female students at Girls is comparable to that available to the male students at Central." Moreover, "[g]raduates of both Central and Girls High, as well as the other senior high schools of Philadelphia," have been and are accepted by the most prestigious universities.

The plaintiff has stipulated that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance." Moreover, she agrees that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." In addition to this stipulation, the defendants presented the testimony of Dr. J. Charles Jones, an expert in the field of education. Dr. Jones expressed a belief, based on his study of New Zealand's sex-segregated schools, that students in that educational environment had a higher regard for scholastic achievement and devoted more time to homework than those in co-ed institutions. The district judge commented that even had the parties not stipulated to the educational value of the practice, "this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement."[2]

Before deciding which school she wished to attend, the plaintiff visited a number of them and developed some definite opinions. As to Girls High, she commented "I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it." As to Central, she said, "I liked it there. I liked the atmosphere and also what I heard about it, about its academic excellence." She was somewhat dis-

2. 400 F. Supp. at 335. The defendants also relied on the testimony of Dr. M. Elizabeth Tidball who studied the educational background of those recognized in Who's Who of American Women. She found that the percentage of those listed was higher for graduates of women's colleges than for those of co-ed schools.

satisfied with her education at George Washington High School because of her belief that the standards which the teacher set for the students were not high enough.[3]

The trial judge found the gender based classification of students at the two schools to lack a "fair and substantial relationship to the School Board's legitimate interest" and enjoined the practice.

The court's factual finding that Girls and Central are academically and functionally equivalent establishes that the plaintiff's desire to attend Central is based on personal preference rather than being founded on an objective evaluation.

A fair summary of the parties' positions, therefore, is that:

1. the local school district has chosen to make available on a voluntary basis the time honored educational alternative of sexually-segregated high schools;
2. the schools for boys and girls are comparable in quality, academic standing, and prestige;
3. the plaintiff prefers to go to the boys' school because of its academic reputation and her personal reaction to Central. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury;
4. the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige.

With this factual background, we now turn to a review of the legal issues. We look first to federal statutory law to determine if it resolves the question raised here.

3. In an affidavit accompanying a Motion to Dissolve Stay Pending Appeal, the plaintiff stated that at the end of the eleventh grade at George Washington, she would qualify for early admission to college.

The financial assistance granted to educational institutions by the federal government has led to its ever-increasing influence in a field which in times past was considered the domain of state, local or private activity. It is not surprising that gender based admission standards have been the subject of Congressional deliberation.

In 1972 Congress provided that the benefits of educational programs funded through federal monies should be available to all persons without discrimination based on sex. 20 U.S.C. §§ 1681 *et seq.* The statute applies, however, to only specified types of educational institutions and excludes from its coverage the admission policies of secondary schools.[4] The bill which passed the House applied to all educational establishments and, if it had become law, would have required that all single-sex schools, primary and secondary, public and private, become coeducational.

However, the Senate proposal, which was the one enacted, eliminated these provisions for reasons which became apparent during debate on the measure. On the floor of the Senate, Senator Bayh offered an amendment to restrict the application of the Act. He explained:

> "As my colleagues know, a similar amendment on the House side was the center of some controversy because many felt that the admissions policies of too many schools were covered without sufficient study and debate. Because of the time pressures on the House side, long preparation was not possible. One result of the House approach is that all single-sex elementary and secondary institutions of education—both public and private—would be required to become coeducational. While this may be a desirable goal, no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the

4. Moreover, there is a specific exclusion of the admissions policies of public colleges which traditionally enrolled only students of one sex. 20 U.S.C. § 1681(a)(5).

> schools might argue for a continued single-sex status." 118 Cong. Rec. 5804 (February 28, 1972).
>
> • • •
>
> "In any event, I believe specific hearings are needed to answer these questions which had not been raised at the time of the 1970 hearings. Since there are also a number of high schools which are single sex, a similar study is needed on the question of requiring them to admit students of both sexes. I have been amazed to learn that the Office of Education does not even keep statistics on how many elementary and secondary schools—even public schools—are restricted in admissions to one sex. After these questions have been properly addressed, then Congress can make a fully informed decision on the question of which—if any—schools should be exempted." 118 Cong. Rec. at 5807 (February 28, 1972).

For further discussion *see* the Senate debate at 118 Cong. Rec. 5803-5815 (February 28, 1972). These narrowing provisions of the amendment became a part of the Act as it was finally passed by Congress. *See* 20 U.S.C. § 1681(a)(1)-(5).

During that same year, the House passed HB 13915 entitled "The Equal Educational Opportunities Act," legislation aimed against busing as a means of securing racial balance in schools. The original bill, which was referred to committee, contained no reference to discrimination based on sex, and the hearings were devoted to testimony on the busing issue. For reasons not explained in the committee report, the word "sex" was added in certain parts of the bill. The summary of the bill as it was reported out of committee included these comments:

> *"Section 2. Policy and purpose*
>
> Subsection (a) of this section declares it to be the policy of the United States that all public school chil-

dren are entitled to equal educational opportunity without regard to race, color, sex or national origin . . .

• • •

"*Section 3. Findings*

Subsection (a) contains a number of congressional findings:

(1) the maintenance of dual school systems where pupil assignments are made solely on the basis of race, color, sex, or national origin denies the equal protection of the laws." H. Rep. No. 92-1335, 92d Cong., 2d Sess., 9 (1972).

These provisions were eventually incorporated into the Act as passed by the House.

Facially, these sections conceivably could indicate a determination by the House that one-sex schools should not continue. However, a review of the House proceedings shows some unexplained and curious deviations between pertinent sections of the bill as described in the committee report and as actually reported out and finally passed. Representative Pucinski, a sponsor of the bill, presented the summary from the committee report on the floor of the House before debate began, including the following:

"*Section 201. Denial of equal educational opportunity prohibited*

"This section prohibits a State from denying equal educational opportunity to an individual on account of race, color, sex, or national origin by—

(1) deliberate segregation by educational agencies on the basis of race, color, *sex*, or national origin among or within the schools;

• • •

(5) transfer by educational agencies of students from one school to another if the purpose and effect is

to increase segregation of students on the basis of race, color, *sex*, or national origin . . . ." 118 Cong. Rec. 28837 (August 17, 1972). (Emphasis supplied)

Significantly, the word "sex" at the points we have italicized it in the text had already been deleted from the bill and in that form it passed the House and was sent to the Senate. An examination of the legislative history and record of debate affords no explanation for these important deletions. After extended debate in the Senate, the bill was defeated.

In 1974, during House debate on HR 69, a bill to extend and amend the Elementary and Secondary Education Act of 1965, Representative Esch, an advocate of the Equal Educational Opportunities Act of 1972, proposed an amendment identical in relevant portions with that Act. The amendment was adopted and HR 69, after modifications in the Senate not pertinent to our discussion, was enacted into law. 20 U.S.C. §§ 1701-1721.

The result is an anomaly. In an early part of the enactment, Congress finds that maintenance of dual school systems in which students are assigned solely on the basis of sex denies equal protection. 20 U.S.C. § 1702(a)(1). Despite that policy pronouncement, however, the statute does not prohibit the states from segregating schools on the basis of sex although there is a specific proscription on segregation based on race, color or national origin. 20 U.S.C. § 1703(a). Insofar, then, that the Equal Educational Opportunities Act of 1974 might have application to established single-sex schools, the legislation is at best ambiguous.

An explanation for the lack of clarity may be found in the context of congressional concerns at the time. The debates in the House and Senate, both in 1972 and in 1974, demonstrate that Congress was completely absorbed by the highly emotional issues generated by busing to achieve racial integration. Questions of constitutionality and policy as they applied to the busing problem pre-occupied

the speakers. Not once during the extended and heated discussions was there any reference to single-sex schools.[5]

An analysis of the statutory language, which recognizes the background to the legislative effort, is helpful. Congress' finding as to "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex . . ." should be read in the light of the policies followed by many communities to avoid racial integration. It is at least questionable that Philadelphia maintains a "dual school system" and the application of this phraseology to the case at bar is dubious.

The Act's policy declaration is that children are entitled to "equal educational opportunity" without regard to race, color, or sex. The finding of the district court discloses no inequality in opportunity for education between Central and Girls High Schools. We cannot, therefore, find that language applicable here.

Section 204(c), 20 U.S.C. §1703(c), is intelligible if read against the background of the busing controversy which spawned it. That subsection prohibits the assignment of a student to a school other than the one closest to his residence if the assignment results in a greater degree of segregation in the schools based on race, color, sex or national origin. The thrust is directed toward the "neighborhood school" concept, which was so much a part of the busing dispute, and against assignment of students to non-neighborhood schools to achieve segregation on any of the forbidden bases. We do not here face an attempt by a school board to assign "a student to a school other than the one closest to his or her place of residence within the district in which he or she resides . . .," 20 U.S.C. §1703(c).

5. At one point, Representative Anderson introduced a substitute for Mr. Esch's amendment which did not contain the word "sex." The amendment varied, however, in other points considered more significant at the time and was defeated, again without any suggestion that the deletion of discrimination on account of sex was a consideration. *See* 120 Cong. Rec. H 2165-2177 (March 26, 1974). It appears that the Anderson amendment was introduced as legislation more likely to be found constitutional than that proposed by Mr. Esch.

We conclude the legislation is so equivocal that it cannot control the issue in this case. Our research into the legislative history reveals no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives. That drastic step should require clear and unequivocal expression. Judicial zeal for identity of educational methodology should not lead us to presume that Congress would impose such limitations upon the nationwide teaching community by equivocation or innuendo. Congress spoke clearly enough on single-sex schools in 1972 when it chose to defer action in order to secure the data needed for an intelligent judgment. We do not believe that the ambiguous wording of the Equal Educational Opportunities Act of 1974 represented an abandonment of the clearly expressed desire to wait for more information before making a decision. Since no such data were produced, a realistic and, in our view, inescapable interpretation is that Congress deliberately chose not to act and to leave open the question of single-sex schools.[6] We thus have no need to consider the extent to which the legislative body may determine what activity constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970).

Finding no Congressional enactments which authoritatively address the problem, we must consider the constitutional issues which provided the impetus for issuance of the injunction.

The district court reviewed the line of recent cases dealing with sex discrimination, beginning with *Reed v. Reed*, 404 U.S. 71 (1971), and continuing through *Fron-*

6. In Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), Justice Brennan wrote:

"This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (citations omitted)

tiero v. Richardson, 411 U.S. 677 (1973); *Kahn v. Shevin,* 416 U.S. 351 (1974); *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), to *Stanton v. Stanton,* 421 U.S. 7 (1975). As a result of that analysis, the district judge reasoned that, while the Supreme Court has not held sex to be a suspect classification, a stricter standard than the rational relationship test applies and is denominated "fair and substantial relationship."

In each of the cases cited, however, there was an actual deprivation or loss of a benefit to a female which could not be obtained elsewhere. In *Reed v. Reed, supra,* the challenged statute would not permit a female to act as the administrator of an estate if a male qualified for the position. In *Frontiero, supra,* the female officer was deprived of a dependant's allowance which was not available elsewhere. *Stanton v. Stanton, supra,* rejected a statute which set a longer period of minority for payments in support of males than for females. *Kahn* and *Ballard,* by way of contrast, approved benefits to women for which men were not eligible. *See* Note, *The Emerging Bifurcated Standard for Classification Based on Sex,* 1975 DUKE L.J. 163.

In each instance where a statute was struck down, the rights of the respective sexes conflicted, and those of the female were found to be inadequate. None of the cases was concerned with a situation in which equal opportunity was extended to each sex or in which the restriction applied to both. And, significantly, none occurred in an educational setting.

The nature of the discrimination which the plaintiff alleges must be examined with care. She does not allege a deprivation of an education equal to that which the school board makes available to boys. Nor does she claim an exclusion from an academic school because of a quota system, *cf. Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974), or more stringent scholastic admission standards. *Cf. Bray v. Lee,* 337 F. Supp. 394 (D. Mass. 1972). Moreover, enrollment at the single-sex schools is applicable only to high schools and is voluntary, not mandatory. The plaintiff has difficulty in establishing discrimination in the school board's policy. If there are benefits or detriments inherent in the system, they fall on both sexes in equal measure.

Plaintiff cites *Sweatt v. Painter,* 339 U.S. 629 (1950), and *Brown v. Board of Education,* 347 U.S. 483 (1954), which prohibit racial segregation in the educational process. Those cases are inapplicable here. Race is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender.[7] We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law. As the Supreme Court has said: "[g]ender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin, supra* at 356 n.10.

Equal educational opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools. While this policy has

---

7. The dissent's paraphrase of Plessy v. Ferguson, 163 U.S. 537, 544 (1896), is an imaginative argument contending, in essence, that sex is, like race, a suspect classification. That premise, while eloquently expressed, has not been accepted by the Supreme Court.

In *Frontiero,* a plurality treated sex as a suspect classification but a majority has not adopted that position despite several opportunities to do so.

In cases where the Equal Protection Clause is at issue, the state must prove a compelling interest to justify a suspect classification. Rarely can this be done. If only a rational relationship is the test, the state generally prevails. Reed v. Reed, *supra,* apparently establishes a test of "fair and substantial" relationship which falls between the two more traditional norms.

The Equal Protection Clause applies only to the states but in sex discrimination cases the Supreme Court has utilized, in an interchangeable fashion, the Due Process Clause of the Fifth Amendment to reach federal statutes or regulations. Hence, in this opinion we make no distinction between discrimination cases brought under the Fifth Amendment. *See* Weinberger v. Wiesenfeld, 420 U.S. at 638, n.2.

limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial.

The only occasion on which the Supreme Court ruled upon a gender classification in school admissions policy was in *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd*, 401 U.S. 951 (1971), a case which was decided many years after *Sweatt, supra*, and *Brown, supra*. *Williams* was a summary affirmance of a three-judge district court, and we do not have the benefit of the Supreme Court's reasoning. Yet, the result does have precedential weight for us. *Hicks v. Miranda*, 422 U.S. 332 (1975). The district court's opinion details a fact situation quite similar to that confronting us here, except that the plaintiffs were males who sought admission to a girls' state college. *Reed v. Reed, supra*, had not yet been decided and the district court therefore had no reason to discuss a substantial relationship test. Rather, it applied the traditional rational relationship guidelines. The court said:

> "While history and tradition alone may not support a discrimination, the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason." 316 F. Supp. at 137.

Believing the problem could not be considered in isolation, the court noted that the school involved was only one in an extensive state system which included several co-ed schools as well as an all male one.

We may not cavalierly disregard *Williams* although it predated *Reed* by a few months.[8] Indeed, the two cases are not inconsistent because the state schools' restrictive admissions policy applied to both sexes, a significant difference from the preferential statutory procedure in *Reed*.

8. Probable jurisdiction was noted in Reed v. Reed on March 1, 1971. Williams was affirmed on March 8, 1971.

This distinction is enough to justify the use of the rational relationship test in *Williams* even though it is likely that the result would have been the same under the substantial relationship formula.

We do not accept *Williams* as being inapplicable merely because males were barred rather than females, as in the case *sub judice*. We are aware of the suggestion that disparity is likely to be favorably considered when it confers on the female some benefit tending to rectify the effects of past discrimination. For example, in *Kahn v. Shevin, supra*, a widow's tax exemption was permissible although no such benefit was provided for a widower. *See also* 1975 DUKE L.J. 163, 179; Note, *The Supreme Court 1973 Term*, 88 HARV. L. REV. 129 (1974). But we have no such exempting qualification here because there is no evidence of past deprivation of educational opportunities for women in the Philadelphia School District. Indeed, the factual findings establish that, for many years past and at the present, excellent educational facilities have been and are available to both sexes.[9]

Since there is no remedial measure at stake, we see no basis for differentiation between *Williams* and the case at bar. Consequently, we differ with the district court's opinion that *Williams* has only a tenuous applicability here. In our view it is strong, if not controlling authority, for denial of an injunction.

The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a

9. This fact, in addition to others, distinguishes the case of Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.

We need not decide whether this case requires application of the rational or substantial relationship tests because, using either, the result is the same.[10] We conclude that the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution.

The gravamen of plaintiff's case is her desire to attend a specific school based on its particular appeal to her. She believes that the choice should not be denied her because of an educational policy with which she does not agree.

We are not unsympathetic with her desire to have an expanded freedom of choice, but its cost should not be overlooked. If she were to prevail, then all public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private schools is no more an answer to those people than it is to the plaintiff.

It is not for us to pass upon the wisdom of segregating boys and girls in high school. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the school board's responsibility to determine the best methods of accomplishing its mission.

The judgment of the district court will be reversed.

10. The district court said that "there can be little doubt" that under the rational relationship test the board's regulation would be constitutional.

GIBBONS, *Circuit Judge*, dissenting

The majority opinion may be briefly summarized as follows:

> The object of the [14th] Amendment was undoubtedly to enforce the . . . equality of the two [sexes] before the law, but in the nature of things it could not have been intended to abolish distinctions based upon [sex], or to enforce social, as distinguished from political equality, or a commingling of the two [sexes] upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact with each other do not necessarily imply the inferiority of either [sex] to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for [male] and [female] children, which has been held to be a valid exercise of the legislature power even by courts of States where the political rights of [women] have been longest and most earnestly enforced.

The quotation, with appropriate substitutions, will be recognized immediately as the analysis of Justice Brown, for the majority of the Supreme Court, in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). No doubt had the issue in this case been presented to the Court at any time from 1896 to 1954, a "separate but equal" analysis would have carried the day. I was under the distinct impression, however, that "separate but equal" analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over twenty years ago. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).[1] The majority opinion, in establishing a twentieth-

1. Chief Justice Warren, delivering the unanimous opinion of the Court, stated in pertinent part:

century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*.

But the resurrection of the "separate but equal" analysis is not my most serious quarrel with the majority opinion. What I find most disturbing is the majority's deliberate disregard of an express Congressional finding that the maintenance of dual school systems in which students are assigned to schools solely on the basis of sex violates the equal protection clause of the fourteenth amendment. § 203(a)(1), Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1702(a)(1) (Supp. 1976). So long as Congress has acted within the sphere of its legislative competence in making such a finding, I submit, we are not free to substitute a "separate but equal" legislative judgment of our own. Because I conclude that Congress has acted to prohibit the maintenance of single-sex public schools pursuant to its powers under § 5 of the fourteenth amendment, I dissent from the majority's substitution of a "separate but equal" legislative judgment. I would affirm the decision below.

I

Susan Vorchheimer, the named representative of the class bringing this action, was, when this case commenced, a tenth grade student at George Washington High School, a co-educational comprehensive, as distinguished from an academic, high school. Upon graduation with honors from Masterson School, an academic junior high school, Vorchheimer applied to Central High School, one of two senior academic high schools in the Philadelphia School District which limit their enrollment to scholastically superior students. Admission to Central High School is, and has been

1. (Cont'd.)
We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal . . . . 347 U.S. at 495.

since its founding in 1836, open to males only. The other senior academic high school is Philadelphia High School for Girls, which, as its name implies, admits only females. Vorchheimer is a scholastically superior student qualified to attend a school in which enrollment is limited to such students, and she chose to do so. But she chose to attend Central rather than Girls High because of Central's academic reputation and her favorable personal reaction to its atmosphere as compared with Girls and a number of other senior high schools she visited. Her application for admission to Central, however, was denied solely on the basis of sex. Having met the qualifications for an admission to an academic high school, she could be assigned either to Girls on the basis of her sex or to a non-academic high school within the district on the basis of her residence.

The majority opinion ironically emphasizes that Vorchheimer's choice of an academic high school was "voluntary". It was "voluntary", but only in the same sense that Mr. Plessy voluntarily chose to ride the train in Louisiana. The train Vorchheimer wants to ride is that of a rigorous academic program among her intellectual peers. Philadelphia, like the state of Louisiana in 1896, offers the service but only if Vorchheimer is willing to submit to segregation. Her choice, like Plessy's, is to submit to that segregation or refrain from availing herself of the service.

II

On August 21, 1974, Congress passed a series of amendments to the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.* One of these amendments was the Equal Educational Opportunities Act of 1974 (hereinafter E.E.O.A.), 20 U.S.C. §§ 1701-1758 (Supp. 1976). Section 202(a)(1) of this Act declared it to be the public policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin." 20

U.S.C. § 1701(a)(1). Had Congress stopped there one could argue, as the majority does, that a policy of "equal educational opportunity" does not preclude a "separate but equal" analysis, at least outside the racial context. But Congress went further. Relying specifically on the legislative authority conferred by § 5 of the fourteenth amendment, it made a series of legislative findings in § 203, the most important of which for the purpose of this appeal was that:

> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies those students the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. § 1702(a)(1).

We are thus confronted with an explicit legislative finding that the maintenance of a dual school system on the basis of sex violates the equal protection clause. Philadelphia operates such a system in its senior academic high schools. We need look no further than this legislative finding in order to find a violation for which 42 U.S.C. § 1983 provides a remedy. But Congress was not content, as the majority suggests, merely to assert broad legislative findings that might later prove to be inconsistent with or unrelated to its specific statutory scheme, for it defined in § 204 of the amendment a number of unlawful practices based on its findings. 20 U.S.C. § 1703.

Section 204 states in pertinent part that:

> No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by—
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . .

> sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student. 20 U.S.C. § 1703(c).

This subsection says that a pupil assignment system which results in increased segregation by sex, as well as race, color or national origin, over what would result in a neighborhood assignment system, is unlawful. At first blush Philadelphia may not appear to operate a neighborhood school assignment system, as that term is used in § 204(c), for its academic high schools since eligibility for enrollment at those schools is determined by scholastic excellence rather than residence within a designated area. The majority opinion contends that § 204(c) is inapplicable to the factual setting of this case because the "'neighborhood school' concept which was so much a part of the busing dispute" was not "an attempt to abolish single-sex schools." But this view fails to consider Congress' understanding of the meaning of neighborhood school assignment which is disclosed in another subsection of the E.E.O.A. Section 206, 20 U.S.C. § 1705, provides in pertinent part that:

> [T]he assignment by an educational agency of a student to the school nearest his place of residence *which provides the appropriate grade level and type of education* for such student is not a denial of equal educational opportunity or of equal protection of the laws *unless such assignment is for the purpose of segregating students* on the basis of . . . *sex* . . . . (emphasis added).

It is clear that this subsection must be read in conjunction with § 204(c), for it further clarifies and reenforces the meaning of that provision. Section 206 states that the lawful neighborhood assignment system outlined in § 204(c)

also includes the school nearest the student which provides the "appropriate grade level and type of education" unless assignment to that school is for the purpose of segregation on the basis of race, color, sex or national origin. Thus by assigning academically gifted students to Central or Girls on the basis of sex, the Philadelphia School Board assigns students in a manner which results in greater segregation of students by sex than if it assigned students solely on the basis of the nearest senior academic high school. The Philadelphia dual system for scholastically superior students not only falls within the legislative finding of the denial of equal protection of the laws, but is also a specified unlawful practice under § 204(c).

While I agree with the majority that the language of § 204(c) must be read with an appreciation of the heated debate over the school busing issue, I cannot agree that this contextual background justifies ignoring the plain language of both the legislative finding in § 203(a)(1) and the specified unlawful practice in § 204(c). Indeed, even in the remedial sections of the E.E.O.A., which are not applicable to the case *sub judice*, Congress has emphasized the prohibition of segregating public school students on the basis of sex. *See* § 216, 20 U.S.C. § 1715. If Congress was not talking about single-sex schools in the provisions quoted above, what was it talking about? A more blatant disregard of the plain meaning of ordinarily well understood words of our common language—"dual school systems", "sex", "assignment by an educational agency of a student to a school"—can hardly be imagined. We may not like what Congress has done in enacting this statute but we cannot, as the majority does simply ignore it. The statutory language of the E.E.O.A. convinces me that Congress did not inadvertently add the word "sex" to the list of prohibited bases for assigning public school students but included it in those subsections with the express objective of abolishing single-sex public schools.

Rather than discuss the statutory language of the E.E.O.A. the majority engages in an extensive analysis of what Congress did not say or do in enacting that statute. Focusing on what it alleges to be congressional silence on the issue of school assignment on the basis of sex during the hearings and debates on the E.E.O.A., the majority finds an ambiguity in the statute and concludes that "a realistic, and in our view, inescapable interpretation is that Congress deliberately chose not to act and to leave open the question of single-sex schools." This is certainly a novel use of legislative history, or more precisely, of legislative non-history as a tool for statutory construction. The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control this court's interpretation of the words the ninety-third Congress used in enacting the E.E.O.A. in 1974. Congressional silence, especially that of a different Congress, I submit, can never be used to supersede the otherwise clear language of a statute.

Moreover, the majority opinion relies on a misreading of the legislative history of the E.E.O.A. Judge Weis writes that at some point prior to its being passed by the House, §§ 201(a) and (e) of H.R. 13915, the Equal Educational Opportunities Act of 1972, included the word "sex" among the prohibited bases for segregating or transferring students respectively. The majority then asserts that the word "sex" was deleted from those sections without discussion and from this alleged congressional action draws support for its view that the 1974 legislation is equivocal and anomalous on the subject of single-sex schools. Apart from the issue of the relevance of this alleged action by a different Congress to the proper statutory construction of the plain language of § 204(c) of the E.E.O.A. in which the word "sex" is explicitly mentioned, the majority's description of the 1972 proceedings is inaccurate.

On March 20, 1972, Representative McCulloch speaking on behalf of Representatives Quie and Gerald Ford introduced the Equal Educational Opportunities Act of 1972. This bill was modelled in large part after President Nixon's proposals on schools and busing which were sent in a message to Congress on March 17, 1972.[2] At this stage H.R. 13915 did not mention sex in connection with the existence of dual school systems or the denial of equal educational opportunity. Only race, color and national origin were designated in the unlawful practices section as prohibited bases for segregating, assigning or transferring students. However, after 16 days of extensive hearings, the House Committee on Education and Labor reported an amended version of the McCulloch bill which included sex among the prohibited bases for assigning students in § 201(c) as well as in § 2(a)(1) of the policy and purpose section and § 3(a)(1) of the congressional findings section.[3]

A comparison of the language of the amended version of H.R. 13915 as it was reported out of the House Commit-

2. *See* 118 Cong. Rec. 8928-34 (1972).

3. I have found no discussion of why the word "sex" was added to these provisions in either the House hearings or the Committee Report accompanying H.R. 13915. *See* Hearings on H.R. 13915 Before the House Comm. on Educ. and Labor, 92d Cong., 2d Sess. (1972); H. Rep. No. 92-1335, 92d Cong., 2d Sess. (1972). But this is not to say that the Committee was unaware that it was linking sex with the maintenance or dual school systems and the denial of equal educational opportunity, for it warned in its report that:

> The provisions in the committee bill barring discrimination on the basis of sex are not meant to preclude separation of the sexes within schools for different courses, such as for gym classes. H. Rep. 92-1335, *supra* at 8.

This concern is reflected in the definition of segregation in Title V of H.R. 13915:

> The term "segregation" is defined to mean the operation of a school system in which students are wholly or essentially separated *among the schools* of an educational agency on the basis of race, color, *sex* or national origin or *within a school* on the basis of race, color, or national origin. (emphasis added).

Unlike the majority I believe that in 1972 the House of Representatives consciously intended to include the word "sex" in these sections. It should not be forgotten that it was the ninety-second Congress which finally approved the proposed Equal Rights Amendment before it was submitted to the states for ratification. Certainly if the majority is willing to rely on a contextual background in 1972 to assist in the interpretation of 1974 statutory language, it should at least recognize that after more than two years of extensive consideration of a specific constitutional ban on sex discrimination, Congress probably was not acting inadvertently in dealing with single-sex public schools.

tee on Education and Labor and read to the entire House prior to passage, with that of the original McCulloch bill as it was introduced, is provided in H.R. 13915, 92nd Cong. 2d Sess. (1972). Contrary to the majority opinion's position, this comparison reveals that the word "sex" was never included in §§ 201(a), (e) of the Equal Educational Opportunities Act of 1972. Some confusion, however, is created by Representative Pucinski's Section-by-Section Analysis of the Equal Educational Opportunities Act of 1972[4] in which he states that "sex" is included in §§ 201(a), (e). His analysis, however, does not correspond to the actual language of the Act. It is this unofficial version rather than the official language of H.R. 13915 which Judge Weis quotes in the majority opinion. The majority again engages in a novel and impermissible use of legislative history. Finding an unofficial version of the bill which conflicts with the language of the bill itself, the majority adopts the former for the sole purpose of advancing its argument that the House of Representatives was unclear regarding the objectives of H.R. 13915 in 1972 and that the entire Congress was unclear regarding the objectives of the E.E.O.A. when it passed that legislation in 1974. The majority's assertion, however, indicates only that either a particular congressman was confused about the language of H.R. 13915 in 1972 or that Congress inartfully drafted the E.E.O.A. in 1974 when it modelled that statute after the 1972 bill. If we were congressmen we might want to rewrite the E.E.O.A. to include sex in §§ 204(a) and (e). But as a court we must rely upon the language of the statute as written by Congress and resort to legislative history only to help clarify an ambiguity.

If there were some ambiguity regarding the applicability of § 204(c) to the facts of this case, and I believe none exists, the limited 1974 legislative history of the E.E.O.A. on this issue supports the interpretation I espoused above.

4. This section-by-section analysis is included in H. Rep. No. 92-1335, *supra* at 9-15, and reported as well in 18 Cong. Rec. 28836-38 (1972).

Because it was primarily an anti-busing amendment, the principal focus of the debate on the Esch amendment was on busing to achieve racial desegregation. Relative silence on the matter of sex discrimination is not surprising, since busing has not thus far been an issue in the sex discrimination context. But there was not, as the majority states, total silence on the subject of sex discrimination in the assignment of students. Congressman William Ford, a cosponsor of the Esch amendment, explained the proposal in these words:

> The amendment we now have before us would prohibit these types of [dual] school systems and it would prohibit the assignment of students to a school, based on race, color, *sex*, or national origin. 120 Cong. Rec. H 2161 (March 26, 1974) (emphasis added).

An alternative proposal to the Esch amendment was offered by Representative Anderson. This amendment, however, did not include sex among the prohibited bases for assignment of students.[5] But Congressman Anderson's proposal was rejected.[6] In view of this evidence we cannot assume, as the majority does, that Congress did not intend to prohibit the assignment of students on the basis of sex. Congress expressly added sex to the list of prohibited bases for student assignment and consistently refused to delete it.

In summary, some congressmen, reading the majority opinion, certainly will say, as Samuel Shellabarger said with reference to the Supreme Court's interpretation of the fourteenth amendment in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), and *United States v. Cruikshank*, 92 U.S. 542 (1876), that "many of the framers of these amendments received *information* regarding their intentions which was *new* . . . ."[7]

5. 120 Cong. Rec. H 2166 (March 26, 1974).

6. *Id.* at H 2177.

7. S. Shellabarger's Memorial Address on Chief Justice Morrison Waite, 126 U.S. 585, 600 (Appendix, 1888).

III

The wording of the E.E.O.A. strongly suggests, if it does not compel, the conclusion that it was drafted with an eye to *Katzenbach v. Morgan*, 384 U.S. 641 (1966).[8] Having found that the E.E.O.A. governs this case, we are squarely presented with the precise issue which, according to the majority, we have no need to consider—the extent to which Congress may determine what activity constitutes a violation of the equal protection clause of the fourteenth amendment. The starting point for the consideration of that issue is the text of § 5 itself:

> **The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.**

Is the legislative finding that pupil assignment by sex violates equal protection "appropriate legislation"? In answering that question we can set to one side two rather difficult problems. Certainly state action is involved when the Philadelphia School board makes pupil assignment decisions.[9] Thus we are not confronted with the question of the extent of congressional power to reach private action by legislation pursuant to § 5.[10] Nor are we confronted with an attempt by Congress to contract rights to equal protection already determined by the Supreme Court.[11] Congress eschewed any such attempt by concluding its

8. During the course of debate in the House in 1972 on H.R. 13915, Representative Pucinski, among others, argued that the bill was drafted on the basis of the authority granted in § 5 of the fourteenth amendment and defined by the Supreme Court in Katzenbach v. Morgan, *supra*, 118 Cong. Rec. 28835-36 (1972). *See generally* House Hearings on H.R. 13915.

9. *See, e.g.*, Brown v. Board of Education, *supra*.

10. *See* United States v. Guest, 383 U.S. 745 (1966); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353 (1964); Note, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, 55 Cal. L. Rev. 293 (1967). *Cf.* Communications Wkrs. of American T. & T. Co., L.L. Dept., 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3067 (U.S. June 19, 1975) (No. 74-1601).

11. *Compare, e.g.*, Katzenbach v. Morgan, *supra* at 667-68 (Harlan, J., dissenting) *with id.* at 651-52 n.10. *See* Developments—Congressional Power Under Section Five of the Fourteenth Amendment, 25 Stan. L. Rev. 885 (1973).

legislative findings in § 203 with the caveat "that the provisions of this chapter are not intended to modify or diminish the authority of the courts to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b). Here we are dealing only with a case in which, arguably, Congress has gone further in defining the substantive content of the equal protection clause than have the courts.[12]

I say arguably Congress has gone further than the courts, because at this point in the analysis I do not take a position as to the correctness of the majority's treatment of the sex discrimination cases. But for present purposes I am willing to assume that no case has definitely ruled that a sex based dual school system violates the equal protection clause. So assuming, analysis of the reach of congressional power under § 5 requires still a further refinement. We should distinguish between issues upon which the courts have not ruled, and issues on which the courts have previously rejected an equal protection challenge.

The majority opinion, pointing to *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (per curiam), assumes that the Court has rejected an equal protection challenge to a sex-based dual school system. I have serious reservations about the precedential value of the Court's summary affirmance in *Williams v. McNair*, since for all we know the Court's reasons for affirming the judgment of the three judge district court were other than those relied upon by that court in its opinion.[13] But setting aside those reservations, if *Williams v. McNair, supra*, means what the majority says it means, then this case is controlled by *Katzenbach v. Morgan, supra*.

In *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959), the Court rejected a fourteenth amendment chal-

12. Unlike race, color and national origin, sex has not yet been declared a suspect classification by the Supreme Court. *Compare, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin) *with* Frontiero v. Richardson, 411 U.S. 677 (1973) (only four justices deem sex a suspect classification).

13. *But see* Hicks v. Miranda, 422 U.S. 332 (1975).

lenge to the North Carolina English literacy requirement for the exercise of the franchise. In § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), Congress provided that no person who has successfully completed the sixth primary grade in a public school or accredited private school in Puerto Rico in a language other than English shall be denied the right to vote in any election because of his inability to read or write English. New York voters challenged the constitutionality of the congressional enactment in *Katzenbach v. Morgan, supra*. Justice Brennan wrote for the Court:

> We hold that, in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e). 384 U.S. at 646-47.

Thus Congress effectively determined that a state law violated the fourteenth amendment and set it aside even though the Supreme Court had previously rejected an identical challenge. On the authority of *Katzenbach v. Morgan, supra*, we must hold that the legislative findings in § 203(a)(1) and the prohibition in § 204(c) are proper exercises of the powers granted to Congress by § 5 of the fourteenth amendment, and that by force of the supremacy clause the Philadelphia sex based dual school system for academically gifted high school students cannot remain in operation.

The *Katzenbach v. Morgan* holding has spawned an extensive literature about the respective roles of the Court and Congress, and Congress and the States.[14] *Oregon v.*

14. Perhaps the most useful discussions are Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971), and Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966). Other instructive commentaries include Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amend-

Mitchell, 400 U.S. 112 (1970), in which there is no opinion of the Court and no majority consensus as to the reasons in support of its judgment, shows, at least, that just as with its commerce clause powers, the congressional powers under § 5 of the fourteenth amendment are not unlimited. One could imagine a congressional enactment of an equal protection standard striking down a state classification that is so arbitrary and unreasonable that the Court would reject it. But at the present stage of evolutionary development of our social institutions a court would be foolhardy indeed to suggest that congressional rejection of a state's gender based classification fell into that category.

Assuming, as the majority does, that *Williams v. McNair, supra*, is authority for a separate but equal treatment of the sexes in public education, one would still have to conclude that the legislative finding of § 203(a)(1) that separate is not equal for purposes of the fourteenth amendment has overruled it. Indeed, from an historical perspective, section 5 of the fourteenth amendment would have allowed Congress, had it possessed the decency and will, to overrule *Plessy v. Ferguson, supra*, at any time between 1896 and 1954. Had Congress done so, I suggest, it would have carried the Court along with it. There is much to be said, I submit, in favor of congressional initiative rather than judicial activism in the unfolding of the full meaning of the equal protection clause. When Congress, reflecting the democratic processes, concludes that a state classification is unlawful, its conclusion has the advantage of the authority that comes from democratic consensus, while at the same time its conclusion remains subject to judicial review. When the Court acts similarly there is neither the authority of consensus nor the safeguard of review by another branch. Thus the Court should, it would seem, be appropriately

14. (Cont'd.)
ments, 74 Colum. L. Rev. 449 (1974); Developments—Congressional Power Under Section Five of the Fourteenth Amendment, *supra* note 11; Note, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, *supra* note 11; Frantz, *supra* note 11.

deferential to state classifications, while acknowledging, as it did in *Katzenbach v. Morgan*, that Congress need not be deferential to the same degree. 384 U.S. at 651-56. Certainly Congress has a greater capacity than the Court to weigh the competing considerations. That is not to say, however, that when the Court has struck down a state classification the Congress may feel free to resurrect it. *Id.* at 651-52 n.10.

IV

Thus far I have assumed that *Williams v. McNair, supra*, was precedential to the same extent as *Lassiter v. Northampton Election Bd., supra*. If it is not, obviously the decision to defer to the Congressional legislative finding in § 203(a)(1) of the E.E.O.A. is far easier. The district court concluded, and I agree, that decisions subsequent to *Williams v. McNair, supra*, deprived it of any precedential value it may have otherwise had, and erected new standards for reviewing gender based classifications which were not satisfied in this case by the Philadelphia Board of Education. Certainly if *Williams v. McNair, supra*, is regarded as authority for the proposition that we review gender based classifications by the rational relationship standard, it has been seriously undermined by subsequent cases. *See, e.g., Stanton v. Stanton*, 421 U.S. 7 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). The majority says that this case does not require a decision regarding the applicable standard because the classification satisfies either the rational relationship or the substantial relationship test. The district court concluded, and, I agree, that since *Reed v. Reed, supra*, the rational relationship test is regarded by a majority of the court as inapplicable to gender based classifications.[15]

15. It must be acknowledged that the appropriate standard against which a disputed gender based classification should be measured as synthesized from Reed v. Reed, *supra*; Frontiero v. Richardson, *supra*; Kahn v. Shevin, *supra*; Geduldig v. Aiello, 417 U.S. 484 (1974); Schlesinger v. Ballard, 419 U.S. 498

Unlike the majority I find it particularly difficult to say on the basis of the record in this case that the exclusion of females from Central bears a fair and substantial relationship to any of the Philadelphia School Board's legitimate objectives. Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools. But certainly that observation does not satisfy the substantial relationship test. Some showing must be made that a single-sex academic high school policy advances the Board's objectives in a manner consistent with the requirements of the Equal Protection Clause. *Reed v. Reed, supra* at 76.

The Board, as the district court emphasized, did not present sufficient evidence that coeducation has an adverse effect upon a student's academic achievement. Indeed the Board could not seriously assert that argument in view of its policy of assigning the vast majority of its students to coeducational schools. Presumably any detrimental impact on a student's scholastic achievement attributable to coeducation would be as evident in Philadelphia's coeducational comprehensive schools which offer college preparatory courses as the Board suggests it would be in its exclusively academic high schools. Thus the Board's single-sex policy reflects a choice among educational techniques but not necessarily one substantially related to its stated educational objectives. One of those objectives, in fact, is to provide "educational options to students and their parents." (App. at 38a). The implementation of the Board's policy excluding females from Central actually

15. (Cont'd.)
(1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); and Stanton v. Stanton, *supra*, does not spring from the pages of United States Reports with immediate clarity. But certainly there appears to be a majority consensus against the mere rational relationship test. *See, e.g.*, Johnston, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. Rev. 617 (1974). *See also* Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-10 (1972).

precludes achievement of this objective because there is no option of a coeducational academic senior high school.

Because I agree with the district court that the Board has not made the required showing of a substantial relationship between its single-sex academic high school policy and its stated educational objectives, I would affirm the decision below even if I were willing to ignore the pertinent provisions of the E.E.O.A.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; guardians ad litem on her own behalf and on behalf of all others similarly situated

vs.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Appellants

(D.C. Civil No. 74-791)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, Circuit Judge and MARKEY,* Chief Judge Customs and Patent Appeals and WEIS, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court

*Sitting by designation.

for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 7, 1975, be, and the same is hereby reversed. Costs taxed against the appellees.

ATTEST:

/s/ Thomas Quinn
Clerk

March 16, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, Guardians ad litem,

Plaintiffs-Appellees

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Defendants-Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, Circuit Judges, and MARKEY, Chief Judge of the Court of Customs and Patent Appeals.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who con-

curred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Joseph F. Weis, Jr.
Judge

Dated: April 12, 1976

Judge Gibbons would grant rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, Guardians ad litem	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Newcomer, J. August 7th, 1975.

FINDINGS OF FACT

1. Plaintiff, Susan Lynn Vorchheimer, 15 years old, is a female citizen of the United States of America. She resides with her parents at 9721 Chapel Road, Philadelphia Pennsylvania. This suit is brought on her behalf by her parents, Bert and Carol Vorchheimer, as guardians ad litem.

2. Defendant School District of Pennsylvania is an agency of the Commonwealth of Pennsylvania which has the responsibility for carrying out the Commonwealth's program of public education in and for the City and County of Philadelphia.

3. Defendant Matthew W. Costanzo is the

Superintendent of Schools of the School District of Philadelphia and is sued in his official capacity.

4. In November of 1973, while plaintiff was a ninth grade student at the J. R. Masterman School, a junior high school, plaintiff's parents received a communication from Masterman's principal concerning the various types of senior high schools available to their daughter.

5. This communication listed four types of senior high schools: comprehensive, technical, academic, and "magnet". The two high schools listed under the academic category were Philadelphia High School for Girls and Central High School.

6. This communication stated that "there are specific requirements for admission to [the academic] schools". The communication described these requirements as:

> "Tests - to be fully qualified a pupil must present a minimum score of 82 percentile, national composite score in the most recent Iowa Tests.
>
> Achievement - Must present a record of all "A's" and "B's" with not more than one "C" in any major subject for a full year prior to admission. Marks considered are those from the previous June together with those on the second and subsequent reports of the current school year."

7. Central High School and Girls High (Philadelphia High School for Girls) are the only two academic schools within the Philadelphia School District. These two schools are the only high schools in the Philadelphia School District which draw their student bodies from the entire city. Only 7% of the students in the entire Philadelphia School District are able to meet Central and Girls High admission standards.

8. Both Central and Girls are single sex schools, Central's student body being exclusively male and Girls exclusively female. This segregation by sex has continued, with brief exceptions, since the founding of the two schools and represents the official policy of the Philadelphia School Board.

9. Admission to a comprehensive senior high school is normally based upon a student's residence, i.e., students usually attend the comprehensive high school located in their neighborhood.

10. During December, 1973 and January, 1974, Susan Vorchheimer visited a number of senior high schools in the Philadelphia School District. One school which she visited was George Washington High School, a comprehensive high school which is located in her neighborhood. She also visited Central High School and Girls High.

11. Based on her observations during these visits, and on her past experience in

Philadelphia's public schools, plaintiff decided that she wished to attend Central High School. She rejected the idea of attending Girls High School because, in her words:

> "I...visited Girls and sat in on one of the classes and walked around and I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it."

12. On or about January 11, 1974, plaintiff's father submitted on her behalf an application for admission to Central High School for the following year, which application was in accordance with the procedural requirements of defendants' school system. It is undisputed that plaintiff met Central's academic admission requirements.

13. Masterman School is, like Central and Girls, an academic school. It requires that prospective students meet certain admission criteria before they can be admitted. However, Masterman School only offers instruction through the ninth grade.

14. Upon graduating from Masterman, plaintiff received six awards; the award in English, history, science, and geometry, the American Legion award for citizenship and scholarship, and the most outstanding student award.

15. On or about February 1, 1974,

plaintiff's application for admission to Central High School was rejected solely on the basis of her sex.

16. Plaintiff is currently in the tenth grade at George Washington High School. Her motivation to achieve good grades has declined, due in part to plaintiff's perception that her teachers expect and demand less work than was expected or demanded at Masterman. Consequently, her grade performance has slipped from its previous level at Masterman.

17. Central High School was founded in 1836 as the first public high school in Philadelphia and the second public high school in the United States. Beginning as a small academic high school with a faculty of four and a student body of 63, Central has consistently maintained a reputation for academic excellence even though it temporarily changed from an academic to a comprehensive high school with an enrollment of 4,000 students around the beginning of the twentieth century. During the nineteenth century members of its faculty were nationally known physicists and English stylists. Its graduates have risen to the top of the business world, the professions, politics, and academia. In February, 1939, after various revisions in its curriculum, Central resumed its original character as an academic high school and opened its new building with 41 faculty members and 1,250 students. At the present time Central has a faculty of over 100 and an enrollment of nearly 2,000.

18. Girls High was organized as an academic high school for females in 1893, having evolved from a school established in 1848 whose primary purpose was to train teachers for the Philadelphia public schools. While the school began by offering commercial, teacher training, and college-preparatory courses, the college-preparatory curriculum quickly overshadowed the other two. By 1910, Girls High was exclusively college preparatory. It has fulfilled the vision of many nineteenth century educators, both men and women, by becoming the equal of Central in preparing its students for college.

19. Many men who are currently prominent in the professional, political, and cultural life of this city and state are graduates of Central. Central has a deserved reputation for training men who will become local and national leaders in all fields of endeavor.

20. Central's academic standing and its reputation as a training ground for community leaders has attracted the attention of national leaders throughout Central's history. In 1842 President Polk visited the school. In 1902 President Theodore Roosevelt visited the school to make a speech in which he told Central's students "Don't flinch, don't foul, and hit the hard line." More recently, then Attorney General Robert Kennedy addressed Central's Alumni Association and 200 student leaders in 1964, and then Vice-President Hubert Humphrey received an award

at the school in 1966. The visits of the latter two men were arranged through the auspices of the Barnwell Foundation, which was established by a Central alumnus.

21. The Alumni Association of Central High School is an influential group in Philadelphia, both because of its activities as a group and the individual positions held by its members.

22. The dedication and loyalty of Central's alumni, whether measured by financial contributions or day-to-day participation in matters related to the school, equals the loyalty of many college alumni to their alma mater.

23. While the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central, Girls has had a large number of graduates of note in these fields. Among the current community leaders who have graduated from Girls are three judges of the Court of Common Pleas of Philadelphia and the first vice-president of the American Medical Association.

24. The admissions standards of Girls High School are comparable of those of Central High.

25. Graduates of both Central and Girls High, as well as the other senior high schools

of Philadelphia, have been and are accepted for matriculation by the best and most prestigious colleges and universities.

26. With the exception of scientific facilities, in which Central is superior, the academic facilities of Central and Girls High are comparable.

27. The courses offered at Girls are similar and of equal quality to those offered at Central.

28. Central High is the only high school in Philadelphia with a substantial private endowment. However, there is no evidence that as a result of this endowment Central's facilities, faculty, or course of instruction is superior to Girls.

29. Both Central and Girls have fewer students than they are physically capable of handling. This is in stark contrast to most of the remaining senior high schools, which are substantially overcrowded.

30. In general, it can be concluded that the education available to the female students at Girls is comparable to that available to the male students at Central.

31. Central and Girls are not the only two single-sex schools in the Philadelphia School District. The Edison High School and the Benjamin Franklin High School admit only males and the Kensington High School admits

only females. All three of these schools are comprehensive high schools, which means that they draw their students from the surrounding neighborhood.

32. The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance.

33. There are educators who regard education in a single-sex school as a natural and reasonable educational approach.

34. Dr. M. Elizabeth Tidball, a Professor of Physiology at George Washington University, compared the relative career successfulness, as measured by inclusion in Who's Who of American Women, of women graduates of coed colleges and all women's colleges. She first found that the percentage of women graduating from women's colleges who were later listed in Who's Who was two to three times greater than the percentage of women so listed who were graduates of coeducational institutions. This approximate ratio was constant throughout each decade from the 1910's to the 1950's as well as for the total of all these years.

35. Dr. Tidball's further breakdown of her comparison revealed a direct and positive relationship between the number of women who became career-successful (as defined by Dr. Tidball) following graduation from their school and the number of women faculty present in that school's environment at the time

the woman was a student there. Her study also revealed a direct, negative relationship between the number of men students present at a college and the number of women "achievers" graduating from the institution.

36. Dr. Tidball found no statistical correlation between the number of men faculty present at a college and the number of women achievers graduating from that institution.

37. There were a greater number of women faculty per women students at the women's colleges studied by Dr. Tidball than at the coed institutions she studied.

38. Dr. Tidball testified that it would not be unreasonable to apply her findings to the secondary level, including academic high schools, since neither she nor anyone else had been able to refute her findings as they applied to the college level.

One factor, however, which mitigates against the applicability of Dr. Tidball's study to students at Central or Girls is the lack of information concerning the academic caliber of the single-sex and coed colleges compared in the study. Dr. Tidball merely selected, at random, a total of 1500 women from three editions of Who's Who of American Women. Of these women, 1100 had graduated from college. Dr. Tidball then obtained data on student enrollment, graduates, and faculty composition for the 59 women's colleges and 289 coeducational colleges and

universities attended by the 1100 subjects. While the fact that these institutions graduated women who later appeared in Who's Who might tend to establish these schools as academically superior, Dr. Tidball made no attempt to quantitatively measure the academic achievement of their students.

39. Dr. J. Charles Jones, a Professor of Education at Bucknell University, testified concerning an article which he wrote in conjunction with two other scholars entitled "Coeducation and Adolescent Values". This article was a summary of research conducted on the subject of attitudes among New Zealand secondary students towards school and schoolwork, extracurricular activities, and the approval of their parents and peers.

40. Dr. Jones' study included 1,255 students in their third and fourth years of secondary school in Wellington, New Zealand. Of these students 697 were males, 455 enrolled in an all-boys' school and 242 in a coeducational school. The total of 528 females was divided between 364 in an all-girls' school and 164 in the same coeducational secondary school.

The three schools were similar with respect to curriculum organization, degree of student regimentation, the requirement that all students wear school uniforms, and instructional methods. In Wellington, a small proportion of students elect to attend schools outside their assigned district. However, the large majority attend a particular school because it is in their zone. The girls' school in this study, for example,

drew less than 10% of its students from outside its zone.

This pattern of attending the school in one's district was probably accentuated by the fact that instructional programs, whether in single-sex or coeducational schools, were virtually indistinguishable from one another.

All programs were traditional university preparatory curriculum and all were based on syllabi determined by the demands placed upon the schools by the national public examinations for graduation and university entrance.

The study's authors concluded: "While it was not possible to assign students randomly to single-sex or coeducational schools, the above factors, taken in conjunction with the generally egalitarian nature of New Zealand society, suggest that the three groups probably did not differ markedly from one another in background or motivation upon entry into secondary school."

41. Dr. Jones asked certain questions of students at both the single-sex and coed high schools. The questions arguably relevant to the matter before us were:

i. "How much time, on the average, do you spend doing homework outside school?"

ii. "Suppose you had an extra hour of school, how would you use it?"

iii. "If you could be remembered here at school for one of the three things listed below (brilliant student; leader in activities; most popular), which one would you want it to be?"

42. The Jones study found statistically significant difference between the answers of single-sex students, both boys and girls, and those of coed students to question no. i, supra, concerning amount of time spent on homework. 38% of the coed boys reported spending, on the average, between 1 1/2 and 3 hours per day on homework. Over 55% of the boys attending the all-boys school reported averaging this much time. While differences between the two groups of girls were not as great, they were statistically significant. 55% of the girls at the all-girls school spent 1 1/2 to 3 or more hours per day on homework, while 44.6% of the coed girls reported spending this much time.

43. When asked how they would spend a free hour in school if given a free choice, question No. ii, supra, coed boys differed from boys attending the all-boys' school to a statistically significant degree. 16% of the coed boys stated that they would spend this hour studying, while 26.8% of the other group indicated studying as their first choice. The differences between coed girls and girls attending the all-girls' school were even greater. Nearly 32% of those attending the girls' school would spend the time studying, as opposed to 12.2% of the coed girls who

would spend the time this way.

44. When asked how they would best like to be remembered at their school, as brilliant students, leaders in activities, or as the most popular, question No. iii, supra, the coed boys distributed their choices rather uniformly across the three categories while a majority of the boys at the all-boys' school chose being remembered as a brilliant student or a leader in activities. There were however, no statistically significant differences between the two groups of boys. The girls, on the other hand, did differ significantly, with 41% of the girls at the all girls' school preferring to be remembered as a brilliant student as compared to 25.9% of the coed girls making this choice, and 34.2% of the coed girls wishing to be remembered as "most popular" while 19.4% of the students at the all-girls' school wished to be remembered for this reason.

45. Concerning the applicability of his study to American secondary students, Dr. Jones testified that it would be "almost impossible" to obtain comparable control groups of coed and single-sex students, since most of the American single-sex schools are "either for superior students rather than for [a] random sampling of students, or they are church-related schools, or they are private schools where one probably could expect that they came from a particular socioeconomic strata." (Tr., p. 161) (emphasis supplied). Due to this discrepancy between the New Zealand and the American single-sex secondary

schools, Dr. Jones was reluctant to apply the conclusions of the New Zealand study to American single-sex schools for academically superior students.

46. The Jones study does not indicate that the single-sex character of a school results in better citizenship, or the development of cognitive skills. Nor does it indicate that spending more time on homework will result in greater academic achievement, since the academic achievement of the New Zealand students on standarized tests was not measured, nor was any gauge made as to any improvement on such tests from pre-high school to graduation. The Jones study merely demonstrates that, on the average, the single-sex students of both sexes who were questioned have a higher regard for scholastic achievement than do the coed students, and that they are more likely on the average to spend more time at homework than the coed students.

47. While the varying amounts of time which the two groups dedicate to homework may indicate a difference in motivation, there may be other factors which explain this difference, and this fact alone does not establish a difference in achievement levels between the students in the different types of schools.

48. The general purposes of the Philadelphia school system are to produce good and constructive citizens, who are literate in every sense, and who are able to communicate

effectively. In addition, there is a general goal to teach students saleable skills. (Constanzo deposition, page 4, lines 16-24).

49. The specific goals of defendants' school system are as follows:

i. increasing the efficiency and basic skills of the students;

ii. providing an extensive network of early childhood programming "with the accent on prevention versus cure" (Costanzo Deposition, page 3, line 25);

iii. providing special education programs which would address themselves to the needs of physically, mentally, and emotionally handicapped children;

iv. providing career education whereby students would be introduced to the world of work and would progressively be provided with more in-depth work experience;

v. providing educational options to students and their parents.

50. Defendants have no independent interest in the number of hours a student spends on homework nightly. Defendants' only interest in the length of time a student, male or female, spends on homework is the effect which it may have on that student's academic performance in school.

51. Although the comprehensive high schools offer some courses similar to those taught at Central or Girls, no other high school in Philadelphia offers the range of courses available at Central or Girls, nor do they have a student body selected solely on the basis of academic performance.

The disparity between the student bodies of the academic high schools and the other high schools is demonstrated by their varying performances on the California Achievement Test, which purports to measure a student's reading ability. No Central or Girls students ranked below the 16th percentile on this test. The next lowest ranking in this percentile was made by the students at Northeast High, with 8% in this percentile; 13% of the students at George Washington High, which plaintiff attends, fell in this percentile. Conversely, 51% of Central's and 43% of Girls' students scored in the 85th and above percentile, while only 20% of the students at Northeast and 16% of the students at Washington came within this category.

For these reasons and because of their academic tradition and self-esteem, Central and Girls offer their students an experience which is more intensely intellectual and a better preparation for the atmosphere of a good liberal arts college than is offered by any of the non-academic high schools. Thus a student seeking this kind of public education in Philadelphia does not

have the choice of attending a coed school, but must attend a school of only his or her own sex.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over plaintiff's [sic] jurisdiction over plaintiff's federal claim by reason of Title 42 U.S.C. §1983 and 28 U.S.C. §1343.

2. This Court declines to accept pendant jurisdiction over plaintiff's claim under Pennsylvania's Equal Rights Amendment, (Article 1, Section 28 of the Pennsylvania Constitution), since standards governing the applicability of this amendment in the educational field have not been clearly established by the state courts. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Samuel v. The University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974).

3. This suit is a proper class action under Federal Rule 23 (b)(2). Plaintiff is therefore certified pursuant to that subsection as the representative of all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex.

4. Plaintiff has been denied admission to Central solely because of her sex.

5. Defendants have failed to show that their policy of excluding females from Central

bears a "fair and substantial relationship" to any of their legitimate objectives. Reed v. Reed, 401 U.S. 71, 76 (1971). The analysis performed by Dr. Tidball does not show that males who attend a single-sex school are more likely to be career achievers than those who attend coed schools. It is extremely doubtful that Dr. Tidball's conclusions concerning the correlation between all-women's colleges and career successful women can be applied to women at an academic high school such as Central. Moreover, fostering career successful women is not one of defendants' objectives in excluding women from Central.

Dr. Jones' study also appears to be inapplicable to academic performance at an institution such as Central. Furthermore, defendants failed to affirmatively connect the Jones study findings to any of their educational objectives.

Nor does the record bear out defendant's assertion that maintaining Central as an all-male school promotes educational alternatives. Since a female (or male) student who wishes to attend an academic high school can only attend a single-sex institution, defendant does not provide alternatives at this level.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; Guardians ad litem on her behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

MEMORANDUM AND ORDER

Newcomer, J. August , 1975.

This suit is brought by a young woman, Susan Vorchheimer, through her parents against the School Board of Philadelphia and the Superintendent of Philadelphia's public schools, Matthew Constanzo. The young woman seeks admission to Central High School, one of two senior high schools in Philadelphia which limit their enrollment to academically superior students. Admission to Central High School is, as it has been since the school's founding in 1836, available to males only; consequently, Susan Vorchheimer's application to Central was turned down. The parties have stipulated that were Susan Vorchheimer a boy, she would have qualified for admission to

Central.

Plaintiff decided not to attend the Philadelphia High School for Girls, Philadelphia's other senior high school for academically superior students, which is all female. She is presently attending George Washington High School, a coed, non-exclusively academic high school located in her neighborhood. At the time she brought this suit she had just graduated from the ninth grade; at the present time she has completed the tenth grade.

The legal questions which this case raises are far more complex than the factual ones, and among the legal questions the question of which standard the Court should use to review the School Board's action is by far the most complex. There can be little doubt, for example, that we are faced with a classification which is based on sex; likewise, the fact that the education available at Girls is substantially equal to that available at Central takes this case out of the realm of Brown v. Board of Education,[1] 347 U.S. 483

---

1. We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a constitutional deprivation. While the sociological evidence which underlay Brown's finding of inferiority has not been free from challenge, there is no evidence in the present case that such a feeling of inferiority exists.

(1954). In fact, the outcome of this case depends on which standard of review is applied.

If this case had been brought ten years ago, or perhaps even five, the only precedent to which a court could look would have sanctioned a gender-based classification as long as it was rationally related to some legitimate state interest. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948). These cases not only applied the traditionally permissive "rational relationship" standard to sexual classification but also exhibited the Court's willingness to hypothesize rational relationships on the basis of generalizations which lacked any factual support in the record. In upholding a statute which required women to affirmatively indicate their desire for jury service before they could be picked as jurors, the Court in Hoyt stated:

> "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissable for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." 368 U.S. at 61-62.

In Goesaert, the Court considered a challenge to a Michigan statute which prohibited all women from being licensed as bartenders except for the wife or daughter of the male owner of a licensed liquor establishment. The challenger claimed that it was arbitrary for Michigan to forbid females generally from being barmaids while at the same time excepting the relatives of male tavern owners. The Court first noted that "Michigan could, beyond question, forbid all women from working behind a bar", despite the "vast changes in the social and legal position of women." 335 U.S. 465-466. This was so, the Court said, because:

> "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. at 466.

The Court upheld the distinction drawn between women generally and owners' wives and daughters as "not without a basis in reason..." 335 U.S. at 467.

The Court's willingness to uphold legislative restrictions on women in the name of protecting their health or morals was part of its general deference to the legislature in social welfare matters. The minimal "rational relationship" test used by the Court in reviewing disparate treatment of the sexes was the same test it used to review commercial or social welfare legislation which did

not infringe some right deemed "fundamental" or which did not classify persons according to such "suspect" categories as race, religion, or national origin. See, generally, Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-10. Under this test, a state has a wide scope of discretion in enacting laws which affect some group of citizens differently than others. As the Supreme Court has stated:

> "The [equal protection] safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

The Court has emphasized the degree of deference which it will extend to state legislation under the "rational relationship" test in even more forceful terms:

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are

> otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. McDonald v. Board of Election Comm'rs., 394 U.S. 802, 809 (1969) (Emphasis Added).

There can be little doubt that under this standard the School Board's policy of maintaining Central as an all-boys' school would pass constitutional muster. Most likely plaintiff's stipulation that "the practice of educating the sexes separately is a technique that has a long history and worldwide acceptance" or that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach" would have proven fatal to her case. Even if this were not so, this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement. However, since the time of the "rational relationship" cases mentioned above, the Supreme Court has made a number of rulings in the equal protection area, the common threads of which are unclear, but the net effect of which has been to take classifications based on sex out of the province of the "rational relationship" standard and to place them in a new and unchartered territory, possibly uninhabited by any other classification.

The first of these cases was Reed v.

Reed, 404 U.S. 71 (1971). Reed involved the appeal of the adoptive mother of a decedent who had lost the right to administer the estate to the adoptive father due to a state statute requiring that in appointing administrators the probate court was to favor men over women of the same degree of kinship. A unanimous Court declared the statute violative of the equal protection clause. The grounds for this decision were ambiguously set forth in Chief Justice Burger's brief opinion. While it declared that a statute which discriminated on the basis of sex "establishes a classification subject to scrutiny under the Equal Protection Clause", 404 U.S. at 75, it did not, at least expressly, apply the "strict scrutiny" standard, under which a classification will be upheld only if necessary to achieve a compelling state interest. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U. S. 618 (1969). Rather, the Court articulated a somewhat more elaborate rational relationship standard to govern the controversy before it:

> "The Equal Protection Clause...den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all

persons similarly circumstanced are treated alike." F.S. Royster v. Guano Co. v. Virginia,[2] 253 U.S. 412, 415 (1920). 404 U.S. at 75-76.

The Court found "not without some legitimacy" the state's objective of eliminating the necessity for time-consuming hearings to resolve disputes as to which applicant would be a better qualified administrator, but declared that to prefer males over females "merely to accomplish the elimination of hearings on the merits is to make the very kind of arbitrary choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." 404 U.S. at 76.

---

2. In Royster the Supreme Court struck down a Virginia corporate income tax law which exempted domestic corporations which conducted no business within Virginia from a tax on domestic corporations' out-of-state income. The Court stated that "no ground is suggested, nor can we conceive of any, sustaining this exemption..." 253 U.S. at 416. Justices Brandeis and Holmes dissented on the grounds that the exemption was not clearly unreasonable nor arbitrary. Although the majority opinion used the "fair and substantial relationship" language cited in Reed, the language quoted above seems to indicate the Court was applying the traditional "rational relationship" test.

The description of the gender classification as "arbitrary" in spite of the fact that it obviously furthers the state's "legitimate" objective of more efficient probate administration gave impetus to the assumption that, in dealing with future sexual classifications, the court would apply a more rigorous standard of review than the rational relationship standard. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 (9th Cir. 1974); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Green v. Waterford Board of Education, 473 F. 2d 629, 631 (5th Cir. 1973); Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 21 (1972).[3] This assumption was

---

3. In this well-reasoned and well-written article, the development of this standard was viewed as signalling the possible abandonment of the rigid two-tiered equal protection analysis employed by the Warren Court in exchange for a "means-oriented" equal protection standard applicable to all save racial or other formerly "suspect" classifications. Gunther, cited supra, at 20-25. However, as the author himself notes, Id. at 33-34, the applicability of this standard to Reed is problematic, since in Reed the Court, in effect, held that a legitimate state interest was not compelling enough to justify the challenged classification. "It

(Continued)

reinforced by the fact that the Court refused to follow the reasoning of the Idaho Supreme Court, which had upheld the statute on the grounds that the legislature could reasonably have concluded that men were generally more able to administrate estates than were women, and thus that the classification furthered the state objective of securing the more able administrator. Reed made clear that the Supreme Court would no longer generalize about the relative incompetence of women in order to uphold sexually discriminatory classifications. However, the fact that the Court never even discussed this justification left open the question of whether such generalizations were no longer acceptable, or merely whether they would not be accepted without supporting factual evidence.

The latter interpretation was adopted by several lower courts following Reed. These courts articulated a "strict rationality" or "intermediate" standard of review, under which the government would be required "to produce evidence that the challenged classification furthers the central purpose of the classifier." Berkelman v. San Francisco Uni-

---

3. (Continued)
is difficult to understand [the Reed] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis." Gunther, cited supra, at 34.

fied School District, supra, at 1269.

In Frontiero v. Richardson, 411 U.S. 677, (1973) decided two years after Reed, the Supreme Court dealt with sex discrimination in a manner apparently inconsistent with Reed. In Frontiero, an Air Force officer attempted to claim her husband as a dependent in order to obtain housing, medical, and other fringe benefits of the service. She was denied these benefits under a statute which required female military personnel to prove that their husbands actually depended on them for at least half of their support while male personnel were not required to prove any actual dependency. The Supreme Court struck down this statute. The plurality opinion, written by Justice Brennan and joined in by Justices Douglas, White and Marshall, found sex to be a "suspect" classification, which could be justified only if necessary to accomplish some compelling state interest. The plurality opinion found that the government had failed to show any rational relationship, let alone a necessary one, to their claimed interest in saving money, and declared that the state's interest in administrative efficiency was insufficiently compelling to justify the suspect classification. Four Justices concurred, on the basis of Reed. Justice Rehnquist dissented.

Justice Brennan's explanation of why sexual classifications should be constitutionally suspect was lucid and compelling.

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage...Throughout much of the 19th Century the position of women in our society was, in many respects comparable to that of Blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kantowitz, Women and the Law; The Unfinished Revolution, 5-6 (1969); G. Myrdal, An American Dilemma, 1073 (2d ed. 1962). And although Blacks were guaranteed the right to vote in 1870, women were denied even that right - which is itself "preservative of other basic civil and political rights" - until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most

conspicuously, in the political arena. See generally, K. Amundsen, The Silenced Majority: Women and American Democracy (1971); the President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice. (1970)" 411 U.S. at 684-686.

The concurring opinions, one by Justice Powell in which the Chief Justice and Justice Blackmun joined, the other, a single sentence long, by Justice Stewart, did not directly meet any of these arguments. Instead, Justice Powell argued that Reed offered ample support for the Court's result and that the Court should await the passage of the Equal Rights Amendment before it declared sex a suspect classification. Justice Stewart's concurrence, citing Reed, merely stated that the statutes under attack "worked an invidious discrimination in violation of the Constitution." 411 U.S. at 691.

In Kahn v. Shevin, 416 U.S. 351 (1974) and Schlesinger v. Ballard, U.S. , 42 L.Ed. 2d 610 (1975), the Court demonstrated that the standard of review was still an unresolved matter in the sexual classification area. In Kahn, the Court upheld a Florida statute granting widows[4] a $500 ex-

4. The statute granted a similar exemption to every bona fide Florida resident who had lost a limb or been disabled in war or military hostilities or by misfortune.

emption from ad valorem property taxation against the constitutional challenge of a widower denied a similar exemption. The Court noted United States Department of Labor statistics establishing the continuing disparity between the earnings of men and women in the labor market. The Court then declared that while the widower can usually continue the occupation which preceded his spouse's death, "in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar and in which, because of her former economic dependency, she will have fewer skills to offer." 416 U.S. at 354. The Court continued:

> "We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." 416 U.S. at 355.

The Court found that, in light of the disparate economic status of widows and widowers, their differing treatment under the Florida statute "rests upon some ground of difference having a fair and substantial relation to the object of the legislation." 416 U.S. at 355, quoting Reed v. Reed, 404 U.S. 71, 76.

The Court's opinion in Kahn was written by Justice Douglas, who had joined in the plurality opinion in Frontiero declaring sex to be a suspect classification. The other

Justices who had joined in that opinion all dissented in Kahn, principally on the grounds that the statute was not narrowly enough drawn to withstand strict scrutiny. In response to these dissents, Justice Douglas stated that "the dissent would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated". He then declared:

> "Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services. [citation omitted]..." 416 U.S. at 356.

In Schlesinger v. Ballard, cited supra, the Court upheld a statute providing for the mandatory discharge of a naval officer after twice failing to be promoted above the grade of lieutenant even though a related statute permitted a female officer of the same grade to remain in the service for thirteen years before she could be discharged for want of promotion. Plaintiff was a male officer who had been discharged pursuant to the statute applicable to men. The Court distinguished Reed and Frontiero as follows:

> "In both Reed and Frontiero the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In Reed, the assumption underlying the Idaho statute was that men would generally be better administrators than women. In Frontiero,

the assumption underlying the federal armed services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of service women would not.

"In contrast, the different treatment of men and women naval officers under [the challenged sections] reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 42 L.Ed. 2d at 618. (emphasis in original)

The Court concluded that "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs. [citation to House Report omitted]. Cf. Kahn v. Shevin, 416 U.S. 351." 42 L.Ed. 2d at 618.

Justice Brennan, with whom Justices Douglas and Marshall joined, dissented on the grounds that the majority had failed to apply the strict scrutiny test and, furthermore, that the majority had invented a governmental interest to justify the differential which interest did not, in fact, exist.

Both Kahn and Ballard reflect an unwillingness on the Court's part to overthrow legislation which it perceives as intended to benefit women, either economically or professionally. Justice Douglas, writing for the Court in Kahn, drew a distinction between statutes "designed to rectify the effects of past discrimination against women" and those "which seize upon a group--women--who have historically suffered discrimination in employment, and rely upon the effects of the past discrimination as a justification for heaping on additional economic disadvantages". 416 U.S. at 355, quoting Frontiero v. Richardson, 411 U.S. 677, 689 n. 22. However, these cases did not resolve the question of how critically the Court will examine the nexus between the classification and the state's interest in these "beneficial" situations. The Court in Kahn referred to several statistical surveys, but these merely illustrated disparity earnings of women workers and men workers, not that a $500 widow's exemption would measurably decrease this disparity. The Ballard Court referred to "the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 42 L.Ed. 2d at 618. (emphasis added). However, again, no evidence was presented to show that the means supposedly chosen to lessen this differential--giving women a 13 year period before they could be discharged for want of promotion--actually furthered this objective. These cases seemed to cast further doubt on the concept of "strict rationality", or intermediate review, inse-

curely resting as it did upon the foundation of the Court's opinion in Reed.

Shortly after the Ballard decision was announced, the Court again faced a sex discrimination issue in Weinberger v. Wiesenfeld, 43 L.Ed. 2d 514 (1975). In Wiesenfeld the Court struck down a provision of the Social Security laws which allowed both a widow and her minor children to receive payments based on the deceased spouse's earnings, but which allowed such payments only to the minor children if the surviving spouse is male. A male whose deceased wife's earnings were the couple's principal source of support during their marriage claimed that the statute unlawfully discriminated against him on the basis of his sex.

The Court found the assumption underlying the statute in Wiesenfeld, namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support, to be one of the "archaic and overbroad generalization that could not be tolerated under the Constitution." 43 L.Ed. 2d at 521-522, quoting Schlesinger v. Ballard, 42 L.Ed. 2d 618.

Finding the purpose of the legislation to be the payment of a wage earner's dependents on the basis of their probable need, the Court presumed that in ruling out widowers as beneficiaries Congress had acted on the then generally accepted presumption that a man is responsible for the support of his

wife and child. However, while remarking that this presumption was "...not entirely without empirical support...", the Court declared that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 43 L.Ed. 2d. at 523. No Justices dissented from this result.

The most recent of the Supreme Court cases dealing with sexual classifications is Stanton v. Stanton, U.S. , 43 L.Ed. 2d (1975). In Stanton the Court found that a Utah statute which specified a greater age of majority for males than for females in the context of child support payments violated the female child's right to the equal protection of the laws. Declaring that it was "unnecessary in this case to decide whether a classification based on sex is inherently suspect..." 43 L.Ed. 2d at 694, the Court, per Justice Blackmun, concluded that "...under any test compelling state interest, or rational basis, or something in between-[the statute], in the context of child support, does not survive an equal protection attack." 43 L.Ed. 2d at 696.

While the Court did not specify the standard which it used to measure the Utah statute's constitutionality, it clearly subjected the reasons offered to support the statute to a greater scrutiny than that traditionally extended to commercial or social welfare legislation. See p. 4, supra. The Court first took note of the rationale the

Utah Supreme Court had employed in upholding the statute:

> "It may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males..."

The Court then declared:

> "Notwithstanding the 'old notions' to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statute]... A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. [citation omitted]. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government, and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for

> the girl. To distinguish between the two on educational grounds is to be self-serving; if the female is not to be supported so long as the male, she can hardly be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day in the earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its <u>unquestioned truth</u> or its significance, particularly when marriage, as the statute provides, terminates minority for a person of either sex." 43 L.Ed. at 695. (emphasis added).

ANALYSIS OF SUPREME COURT CASES

A lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea.[5] One in-

---

5. The cases dealing with sex-segregated educational institutions give us little guidance in this case. In <u>Williams v. McNair</u>, 316 F.Supp. 134 (D.S.C. 1970), <u>aff'd</u> 401 U.S. 951 (1971), the Court upheld the exclusion of males from an all-female college. This case was decided prior to <u>Reed v. Reed</u>, and its applicability to exclusion from an all-male in-

(Continued)

terpretation which might reconcile these cases is that sexual classifications cannot be used merely to achieve administrative efficiency or economy, but they may be used to further other, more substantive state interests. This interpretation reconciles the holdings in Reed and Frontiero, and is suggested by the Court's dicta in Kahn and Ballard.[6] However, this interpretation ignores the reasoning of

---

5. (Continued)
stitution is tenuous. (However, the Williams case probably still represents good law as far as the exclusion of males from an all-girls' educational institution is concerned). Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184 (D.C. Va. 1970), the court found that the state-supported colleges available to women were academically inferior to those available to men. Edwards v. Schlesinger, 377 F. Supp. 1091 (D.C. D.C. 1974) involved a challenge to the all-male admissions policies of the United States Naval and Air Force Academies. While that court interpreted Reed as following the permissive "rational relationship" test, it is clear that the exclusion of women bore a fair and substantial relationship under the strict rationality test to the Services' objectives of preparing their academy graduates for combat duty.

6. This interpretation was expressly adopted by the Court in Edwards v. Schlesinger, 377 F.Supp. 1091 (D.C.D.C. 1974).

Wiesenfeld, where a classification was voided even though, as the Court admitted, there was empirical evidence that it furthered a state interest other than administrative efficiency or economy. Moreover, this interpretation ignores the passionate opinions, both majority and dissenting, portraying the injustices which women have suffered and the arbitrariness of many gender-based classifications.

A second possible interpretation is that the Court will impose the "strict rationality" standard in any case in which a classification along sexual lines is challenged, and will uphold such classifications only if the state is able to show that they in fact further a legitimate state interest. While this interpretation would seem to fit the Wiesenfeld and Stanton cases, it cannot explain the reasoning of Kahn, nor, perhaps, of Ballard. Conversely, an interpretation which posits the Court applying the traditionally permissive "rational relationship" test might explain Kahn and Ballard but would flounder on the shoals of Wiesenfeld and Stanton.

A third possibility is that the Court is not applying a uniform standard in reviewing sexual classifications, but will apply a different standard depending on whether the classification is viewed as beneficial or adverse to women. Cf. Kohr v. Weinberger, 378 F. Supp. 1299 (E.D. Pa. 1974); See also Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L. J. 163-187. When reviewing a sexual classification

whose effect was seen as harming women, the Court would apply a strict rationality test, Wiesenfeld; Stanton; cited supra, but when the classification is seen as alleviating the oppressed status of women in society, the Court will apply the permissive "rational relationship" test.[7]

---

7. A further refinement of this approach is that the Court would only require proof of the justification underlying a sexual classification adversely affecting females if that justification is a gender-based generalization, such as the generalization that men are better able to administer estates than women, Reed v. Reed, cited supra, or the generalization that men rather than women are the family's provider. Wiesenfeld, cited supra. Conversely, the Court will not require proof of such gender-based generalizations if the classification which is based on them is seen as aiding females. Ballard, cited supra.

In the present case, defendants do not rely on any gender-based generalizations to justify Central's continued all-male status. The generalizations which they do rely on pertain to adolescent students of both sexes, namely that high-school students will work harder and do better in single-sex schools than in coed schools. However, we do not believe that the absence of a gender-based generalization takes this case out of the line (Continued)

This standard, or standards, is not without its problems. How does a court decide which legislation helps and which legislation hurts women? That this problem is not a judge's

---

7. (Continued)
of Reed and its progeny. As a court has stated in invalidating a school board's policy of enforcing a 50-50 ratio between males and females in an academic high school by denying admission to women who were more qualified than men;

> "In both Reed and Frontiero, stereotypes as to the social roles of males and females formed the bases of the classifications. An unsupported notion that an equal number of male and female students is an essential element in a good high-school education was apparently the justification for the school district's policy requiring higher grade-point averages for females than for males. While that policy is not based upon an invidious stereotype such as was present in Reed or Frontiero, we do not read those cases so narrowly as to sanction all other sex discrimination. No actual proof that a balance of the sexes furthers the goal of better academic education was offered by the school district."
> Berkelman v. San Francisco Unified School District, 501 F.2d 1264, 1269 (9th Cir. 1974). (emphasis added).

fantasy can be seen by comparing the Supreme Court's invalidation of the statute in Weisenfeld even though that statute granted its benefits only to women, and its decision in Geduldig v. Aiello, 417 U.S. 484, (1974), that pregnancy is not a gender-based classification.

The problem of identifying, in normative terms, the impact of the challenged classification on women is present to some degree in the instant case. That keeping women out of Central High has an adverse impact on them seems obvious; yet defendants can argue that the existence of Girls makes the impact of exclusion from Central neutral at worst.[8] However, this argument overlooks Susan Vorchheimer's expressed desire to attend Central, a desire which, in light of Central's history

---

8. Another way of saying this is that the classification drawn here, when viewed in its totality, discriminates in favor of single-sex institutions and against coed ones, not in favor of men against women. If the classification is seen this way, the exclusion of a male from Girls would cancel out the effect of the exclusion of a female from Central. However, Susan Vorchheimer only challenges the portion of defendants' policy which relates to Central, from which she was rejected solely because of her sex. In this sense, defendants' classification is undeniably a sexual one.

and reputation, does not seem frivolous or eccentric. More importantly, the existence of Girls does not satisfy plaintiff's, or any other girl's, desire to attend a coed academic school.

The result of defendants' policy of excluding young women from Central is to deny them the opportunity to attend a coeducational, academically superior, public high school. We believe that this denial is significant enough, in light of plaintiff's express wishes and the evidence of her performance since her rejection, to justify the conclusion that it has an adverse impact on her and on other women.

Defendants could further argue that the purpose of excluding women from Central is to protect them from the disadvantages of coeducation. To begin with, the evidence presented by defendants does not establish that coeducation at an academic high school such as Central would have a detrimental effect on female students. But if such detrimental effects are assumed, the School Board could not then justify its policy of committing the vast majority of its female students to coed schools. Simply put, if coeducation is detrimental to girls, all the public schools should be sex-segregated; if it is not, then there is no "fair and substantial" relationship between sex-segregation and the educational goals of School Board. The fundamental inconsistency which would result if the School Board argues that it keeps girls out of Central for their own protection reveals

that males, and not females, are the intended beneficiaries of defendants' exclusionary policy.

Having identified this classification as adversely affecting women, we need not search for conceivable justifications for it, but may examine the evidence before us to see if it establishes "a fair and substantial relationship" to the School Board's legitimate interests. We find that it does not. Dr. Tidball's study demonstrates that single-sex education at the college level is more likely to aid a woman in developing her potential for achievement than is coed education; this study did not purport to investigate or conclude that male students are so aided. Dr. Jones's study demonstrates that both male and female students at single-sex schools in a certain environment are more likely to study longer, and value scholarship (or at least brilliance) more highly, than do their coed counterparts. The application of the Jones' study's results and conclusions to Central is problematic at best, but even if they are taken as accurate predictions of performance at a coed Central they have not been shown to relate to any of defendants' legitimate objectives. We cannot conclude without some evidence that the difference in time spent in homework or the differences in attitudes towards scholarship represented in the Jones study would have an appreciable impact on academic achievement, let alone the development of literate citizens with saleable skills. As for the School Board's stated interest in offering its students and their

parents the alternative of single-sex education, this "alternative" turns out to be the only choice available to the student who wishes to attend an academic senior high school in Philadelphia.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; Guardians ad litem on her behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

O R D E R

AND NOW, to wit, this 7th day of August, 1975, after a hearing and upon consideration of the briefs and arguments of the parties and the arguments of intervenor defendants, judgment is hereby entered in favor of plaintiff and the class she represents and against defendants on plaintiff's claim arising under the Equal Protection Clause of the Fourteenth Amendment. Defendants are ENJOINED from refusing to admit plaintiff or any other member of the class she represents to Central High School solely on the basis of sex.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.